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ABSTRACT

This document represents a model legal case for defending a girl who wants to play soccer on her high school's all male soccer team. Contained are descriptions of the parties involved, the statement of claim, the causes of action, the laws that action is taken under, and former court decisions that might have bearing on the case. Also included are descriptions of limits on an Equal Protection Suit, athletic regulations and their limitations, problems in private rights of action and class action, and State claims as they refer to Equal Rights Amendments. (EB)

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WOMEN'S RIGHTS PROJECT

SPORTS PACKET

American Civil Liberties Union
New York, New York
Women's Rights Project

June 1978

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TO: Attorneys Litigating a Case on Behalf of a Girl Who Wants To Play Soccer on Her High School's All Male Soccer Team

FROM: Jill Laurie Goodman

DATE: June, 1978

I. THE MODEL PLEADINGS

These model pleadings are the basic tools for a suit on behalf of a girl who wants to play on a boys' athletic team.

The facts of the hypothetical case are these: a talented girl athlete decides she wants to play soccer. Finding no girls' team at her high school, she tries out for the boys' team, makes the team, and begins to practice. All goes well until the first game of the season when the coach of the opposing team objects to her participation and, in support of his position, cites state athletic association rules which forbid mixed-sex soccer. The girl's coach, afraid of athletic association reprisals, refuses to let her play. When the school and the school district back up the coach, the girl and her parents seek a lawyer.[1]

The lawsuit we propose in response to this and similar refusals to let girls play sports has two causes of action. The first, brought under 42 U.S.C. §1983, seeks to enforce the girl's right to the equal protection of the laws. The second, brought under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, seeks to enforce statutory rights to an education free from sex discrimination. Other causes of action under state law, particularly state Equal Rights Amendments, should be considered.

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1 The facts are spelled out in detail in the Complaint and Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction.

Ruth Bader Ginsburg, *General Counsel* • Wendy Webster Williams, *Chair, Advisory Committee* • Kathleen Willert Peratis, *Director*
Susan Deller Ross, *Clinical Director* • Jill Laurie Goodman, *Staff Counsel* • Marjorie M. Smith, *Staff Counsel* • Patricia Beyea, *Project Coordinator*

The model pleadings include: (1) a complaint, with annotations, (2) an order to show cause with a temporary restraining order, (3) a memorandum in support of a motion for a preliminary injunction, and (4) a response to a motion to dismiss the Title IX cause of action, which does present some possibly thorny legal problems.

II. EQUAL PROTECTION CLAUSE AND 42 U.S.C. §1983

A. The Law

A cause of action brought under 42 U.S.C. §1983 to enforce the equal protection clause should be a winning claim. Solid precedent supports it. Bednar v. Nebraska School Athletics Association, 531 F. 2d 922 (8th Cir. 1976)(cross-country skiing); Brenden v. Independent School District, 477 F. 2d 1292 (8th Cir. 1973) (tennis, skiing and running); Morris v. Michigan State Board of Education, 472 F. 2d 1207 (6th Cir. 1973) (non-contract sports); Leffel v. Wisconsin Interscholastic Athletics Association, No. 75-C-174 (E.D. Wis., Jan. 19, 1978) (contact sports); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (soccer); Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976) (baseball); Gilpin v. Kansas State High School Activities Association, Inc., 377 F. Supp. 1233 (D. Kan. 1973) (cross-country competition); Reed v. Nebraska School Activities Association, 341 F. Supp. 258 (D.Neb . 1972) (golf).

While the weight of authority rests on the side of girls who want to play on boys' teams, some courts have ruled against girls bringing such claims. Among them is Bucha v. Illinois High School Athletic Association, 351 F. Supp. 69 (N.D. Ill. 1972), holding that excluding girls from the boys' swimming team, even when there is no competitive, interscholastic girls' team, is consistent with the equal protection clause. This case, however, applies the rational relationship test for determining the constitutionality of state action discriminating on the basis of sex and takes no account of Reed v. Reed, 404 U.S. 71 (1971), and post-Reed cases, like Craig v. Boren, 429 U.S. 190 (1976), applying a higher standard of review. Another potentially troubling case is Ritacco v. Norwin School District, 361 F. Supp. 930 (W.D. Pa. 1973), a peculiar opinion in which the court finds the case moot and then decides against the plaintiff's constitutional claim.

Subsequent to Ritacco, however,at least one Pennsylvania court ruled that, under the state ERA, schools must permit girls to play on boys' teams, even when the school sponsors a girls' team and even in contact sports. Commonwealth v. Pennsylvania Athletic Association, 334 A. 2d 839 (Pa. Cmwlth. Ct. 1975).

B. Limits on an Equal Protection Suit

An equal protection suit remains an easy winner as long as a girl wants to play a non-contact sport and as long as the school sponsors no girls' team. As soon as the girl wants to play a contact sport or the school provides a separate team, the case becomes more difficult.

1. Contact Sports[2]

Courts, even courts that have ruled in favor of young female athletes, often appear reluctant to let girls play contact sports. Brenden v. Independent School District, 477 F. 2d 1292 (8th Cir. 1973), holding that girls must be given the opportunity to participate in tennis, cross-country skiing and running, explicitly confined its ruling to non-contact sports. Morris v. Michigan State Board of Education,472 F. 2d 1207 (6th Cir. 1973), modified a district court's preliminary injunction by excluding contact sports from an order requiring schools to permit girls' full participation in interscholastic athletics. Failure to make a record on contact sports is the stated reason for the modification in Morris; the result, however, shows judicial reluctance to compel mixed-sex contact sports.

Even in Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976), in which an athletic association's rule against mixed-sex competition in contact sports came under direct attack, the court hesitated to hold that girls had a right to play contact sports. The court granted the motion for a preliminary injunction, but based its ruling on the athletic association's obligation to make a reasonable distinction between contact and non-contact

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2 The sport chosen for these model pleadings is soccer. Since soccer is considered universally neither a contact sport nor a non-contact sport, this is an ambiguous choice. In Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977), the court ruled in favor of a girls' equal protection challenge to exclusion from soccer without apparent concern over the contact/non-contact issue. However, such a suit may run into problems.

sports which,the court said, had not been done.

Some authority does support girls who want to play contact sports. Leffel v. Wisconsin Interscholastic Athletics Association, C-75-174 (E.D. Wis., Jan. 19, 1978), decided a facial challenge to an athletic association rule and held that denying girls the opportunity to play contact sports violated their constitutional rights. Other courts have ruled in favor of girls who wanted to play specific contact sports. Fortin v. Darlington Little League, 514 F. 2d 344 (1st Cir. 1975) (baseball); Yellow Springs School District v. Ohio State Athletics Association, 443 F. Supp. 753 (S.D. Ohio 1978) (football); Carnes v. Tennessee Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976) (baseball); Clinton v. Nagy, 411 F. Supp. 1397 (N.D. Ill. 1976) (football).

Contact sport cases, then, are not hopeless, just harder.[3]

2. Separate Teams

Cases on behalf of girls who want to play on a boys' team at a school that does field a girls' team are not only more difficult; they also raise grave questions about the applicability of the separate but equal doctrine to claims of gender discrimination which, if decided wrongly, could damage other equal protection litigation. For this reason, cases in which there is a girls' team should be approached with utmost caution.

In considering a case challenging separate girls' teams,we must bear in mind that the doctrine of separate but equal has never been declared unconstitutional as it applies to sex discrimination. Indeed, we have every reason to believe

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3 Distinctions on the basis of whether a sport is or is not a contact sport are indeed vulnerable to attack since the contact/non-contact distinction is weak. I am convinced that labelling a sport "contact" is only another way of saying covertly what can no longer be said openly--that something in the very nature of the sport makes it suitable for males and not females. It is, in fact, the sports most closely associated with images of male power and solidarity that are labelled contact, not the sports where participants touch most often.

the Supreme Court might find it quite acceptable. Last year's Supreme Court ruling in Vorchheimer v. Philadelphia School District, 430 U.S. 703 (1977), points to troubled waters. In Vorchheimer, a girl challenged the discriminatory admissions policy of Philadelphia's Central High School, one of the nation's oldest and most distinguished high schools, traditionally reserved for males. Philadelphia girls who wanted the benefits of a tough academic high school could attend Philadelphia's High School for Girls. While acknowledging Central High's superior facilities, at least in science, the Court of Appeals for the Third Circuit, nonetheless, ruled that Central High's discriminatory admissions policy did not offend the equal protection clause. An equally divided Supreme Court, with Justice Rehnquist absent from the bench the day the case was argued, affirmed the appellate court ruling.

Nor do athletics cases afford us any comfort for a challenge to "separate but equal" teams. The helpful authority in support of challenges to discrimination against girls in athletics programs is found in cases where girls had no teams of their own. See cases cited in Section IIA supra.

Indeed, two cases which strongly support the right of girls to play on boys' teams when they have no team of their own both limit their application to cases where no separate but equal challenge is made. In Brenden v. Independent School District, 477 F. 2d 1292, 1295 (8th Cir. 1973), the court plainly stated: "...we are not faced with the question of whether the schools can fulfill their responsibilities under the Equal Protection Clause by providing separate but equal facilities for females in interscholastic athletics." In Hoover v. Meiklejohn, 430 F. Supp. 174, 176 (D. Colo. 1977), the court was more forthright and more discouraging:

> The doctrine [of separate but equal] was rejected for education in Brown, supra, upon the conclusion that racial separation was inherently unequal because it involved a stigmatizing inferiority for the minority race. No such effect is conceivable for a separation of athletic teams by sex.[4]

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4 The court, of course, is dead wrong in its statement that separation of sexes in athletic competition does not stigmatize girls as inferior. Assumptions about the inferiority of the athletic ability of females is precisely the justification for the separation of the sexes in sports competition.

Also instructive is Leffel v. Wisconsin Athletic Association, No. 75-C-174 (E.D. Wis., Jan. 19, 1978), in which the court, relying heavily on Hoover, stated repeatedly that separate teams, even if they do not offer comparable levels of competition, satisfy constitutional requirements.

The result in Vorchheimer and the lack of support in cases favorable in other ways to the claims of young female athletes militate against advancing the argument that separate but equal is unconstitutional. This does not mean, however, that separate teams are immune from attack. They can still be challenged on the theory that they are in fact unequal. Indeed, Hoover suggests this approach. A careful survey of the two teams will probably uncover rampant inequalities in financial support from the school, quality of equipment, priorities for setting practice schedules, and extent of interscholastic competition.

3. Potential Problems Suing Under 42 U.S.C. §1983

Two questions about defendants in the 42 U.S.C. §1983 claim deserve special attention. The first is a potential state action problem. The athletic association, nominally a private organization, may claim it is not bound by the Fourteenth Amendment. Fortunately, courts have considered this question in race discrimination cases, as well as sex cases, and decided the question favorably. The leading case is Louisiana High School Athletic Association v. St. Augustine High School, 396 F. 2d 224, 227-228 (5th Cir. 1968). See also Brenden v. Independent School District, 477 F. 2d 1292, 1295 (8th Cir. 1973); Yellow Springs School District v. Ohio Athletic Association, 443 F. Supp. 753, 757 (S.D. Ohio 1978); Leffel v. Wisconsin Interscholastic Athletic Association, 398 F. Supp. 749, 750 (E.D. Wis. 1975); Gilpin v. Kansas State High School Activities Association, Inc., 377 F. Supp. 1233, 1237 (D. Kan. 1974). Cases which have nothing to do with race or sex discrimination have also held or assumed that state athletic association activities are subject to the equal protection clause. Moreland v. Western Pennsylvania Interscholastic Athletic Association League, 46 U.S.L.W. 2411 (3d Cir. 1978); Oklahoma High School Athletic Association v. Bray, 321 F. 2d 269 (10th Cir. 1963).

The second and more complicated issue involves the nature of entities subject to liability under 42 U.S.C. §1983.

Only "persons" may be sued under §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." [Emphasis added]

Until recently, serious problems about what kinds of entities were "persons" under §1983 plagued civil rights litigation. The modern history of these difficulties dates back to Monroe v. Pape, 365 U.S. 167 (1961). Monroe held that municipalities, in this case the city of Chicago, could not be sued for damages under §1983. This holding was based on an erroneous reading of the legislative history surrounding Congressional rejection of a proposed amendment to the bill which became the Civil Rights Act of 1871, the precursor of §1983. The rejected proposal, known as the Sherman Amendment, would have made municipalities liable for private acts of violence committed within their borders, whether or not the municipalities had the authority under state law to exercise police powers. Monroe read Congressional reluctance to include this novel--and perhaps, under precedent of the day, unconstitutional--form of vicarious liability as Congressional rejection of all municipal monetary liability, including liability for municipalities' own unconstitutional acts.

These problems are no longer so serious. Monell v. Department of Social Services, _____ U.S. _____, 46 U.S.L.W. 4569 (June 6, 1978) overruled Monroe's troublesome holding on municipal liability. Monell was a suit against the New York City Board of Education, challenging its policy of forced maternity leave, similar to the policy found unconstitutional in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). Unable to distinguish suits against school boards from suits against municipalities, the Supreme Court re-examined the legislative history of §1983 and concluded Congress never intended to grant complete immunity to municipalities or similar governmental bodies.

Monell, however, explicitly left open questions about the nature and extent of municipal liability. First, Monell permits §1983 liability only "when execution of a government's policy or custom, whether made by its lawmaker or by those whose edicts or acts may fairly be said to represent official policy ..." 46 U.S.L.W. at 4579. Liability on a theory of respondent superior, when all the government has done is employ a tortfeasor, is precluded. In Monell, no question arose about whether the acts that caused the injury involved official policy. In another case it may, and litigation over what "may fairly be said to represent official policy" is all but inevitable.

Second, the Court decided only that municipalities have no claim to absolute immunity; the Court expressed no view on whether municipalities are entitled to some form of limited immunity. This question too will undoubtedly be the source of further litigation.

Monell opens up a broad field of potential defendants in a suit like that in the model pleadings. Entities, like school districts and athletic associations, can and should be sued; they are most directly responsible for the discrimination and they can most easily eliminate it. But responsible officials and employees should also be named as defendants. Because of the questions expressly left undecided in Monell, government bodies may in any particular case escape liability. Additionally, suing individuals may create leverage in negotiations and may provide some procedural advantages.[5]

III. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, 20 U.S.C. §1681

The Title IX cause of action, while appealing in many ways, does present serious problems. The model complaint includes Title IX allegations, and a model reply to a motion to dismiss suggests ways to handle some problems likely to arise. However, success--or even smooth sailing--isn't guaranteed.

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5 Rule 32(a)(2) Fed. R. Civ. P., for example, permits depositions of parties and their officers, directors and managing agents to be used for any purpose. The use of depositions of non-parties is more limited.

A. The Law

Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681, et seq., outlaws discrimination in all federally assisted educational programs. Its broad antidiscrimination provision, 20 U.S.C. §1681, reads:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...

The next section, 20 U.S.C. §1682, provides for enforcement: it directs agencies making federal grants to promulgate regulations and authorizes enforcement of those regulations through withdrawal of federal funds and "other means." The authority to terminate federal funding however is limited "to the particular program, or part thereof, in which... non-compliance is found."[6] Id. The last section, 20 U.S.C. §1683, provides for judicial review of agency actions. This statutory scheme parallels Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d, et seq., which outlaws discrimination on the basis of race, color and national origin in programs receiving federal funds.

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6 Defendants may claim that this "pin-point" provision limits, not the power of the government to withdraw funds, but the reach of the statute itself. This claim has been squarely rejected in the construction of Title VI: "This provision of course is directed towards the efforts of federal agencies in effecting compliance with Title VI, and is not a restriction on the types of discrimination outlawed by the statute." Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377, 383 (D.D.C. 1976). Courts finding Title VI coverage on the basis of federal financial assistance only remotely related to the practices challenged as discriminatory confirm this construction. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600-4 (D.S.C. 1974), aff'd 529 F. 2d 514 (4th Cir. 1975); McGlotten V. Connally, 338 F. Supp. 448 (D.D.C. 1972). But cf. Romeo Community Schools v. HEW, 438 F. Supp.1021 (E.D. Mich. 1977); Stewart v. New York University, 430 F. Supp. 1305 (S.D.N.Y. 1976).

For an extensive discussion of the pinpoint provision and an example of its application, see Board of Public Instruction of Taylor County v. Finch, 414 F. 2d 1068 (5th Cir. 1969).

B. Title IX Athletics Regulations and Their Limitations

Title IX regulations on athletics are the product of bitter struggles; the weaknesses of the resulting provisions severely limit their usefulness. A case with facts like those of the model pleadings could use the regulations to support the Title IX cause of action; however, a girl who wants to play contact sports or to integrate a boys' team when her school has a girls' team in the sport she wants to play will find the regulations offer no assistance. Indeed, she will probably find the regulation used by the defense in justification of discriminatory policies.

Title IX regulations explicitly forbid discrimination in athletics programs:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such a basis. 45 C.F.R. 86.41 (a).

This general provision, however, is riddled with exceptions and qualifications. The regulations, for example, while requiring the provision of "equal opportunity for members of both sexes," 45 C.F.R. 86.41 (c), permit "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams." 45 C.F.R. 86.41(c). High schools and colleges are permitted three years to adjust to these regulations; compliance is not even required until July 21, 1978. 45 C.F.R. 86.41 (d).

The exceptions extend to separate teams, despite the last phrase of the general provision which appears to forbid separate teams, and to contact sports:

> Separate teams: ... a recipient may sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other

> sex and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of [sic] major activity of which involves bodily contact. 45 C.F.R. 86.41 (b).

Translated into practical terms, this means that separate teams are perfectly fine unless the school sponsors no girls' team in a particular sport. And even then the school has no obligation to provide an opportunity for girls to play one of the listed "contact sports."

Indeed, the regulations leave open the possibility that sports besides those listed will be considered contact sports. The regulations' definition of contact sports includes "other sports the purpose of [sic] major activity of which involves bodily contact." Since the regulations went into effect, HEW has considered and rejected the claim that baseball is a contact sport. Soccer is now the object of HEW's scrutiny.[7]

In short, Title IX is probably useful only to a girl who wants to play a non-contact sport at a school with no girls' team in the sport. Suing under other circumstances means challenging Title IX regulations. Such a suit would not be impossible. One court has said in dicta that 45 C.F.R. 86.41(b) is unconstitutional "to the extent it authorizes recipients of federal aid to deny physically qualified girls the right to compete with boys in interscholastic contact sports." Yellow Springs Board of Education v. Ohio High School Athletic Association, 443 F. Supp. 753, 758-759 (S.D. Ohio 1978).

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7 PEER (Project on Equal Education Rights) monitors HEW Title IX activities, including the Department's machinations over which sports are contact sports. It reports on HEW's activities in PEER Prospective, a useful newsletter for anyone interested in Title IX. PEER's address is 1029 Vermont Ave., N.W., Suite 800, Washington, D.C. 20005.

Another immensely valuable resource is SPRINT, a national clearinghouse collecting huge quantities of useful information on women and sports. SPRINT is a project of the WEAL Fund, 805 15th St., N.W., Washington, D.C. 20005. SPRINT's newsletter is In The Running.

Title IX regulations have been successfully challenged, albeit by school boards seeking to restrict Title IX coverage rather than expand it. See Brunswick School Board v. Califano, No. 77-168-SD, 46 U.S.L.W. 4124 (D.Me., April 13, 1978); Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), striking down portions of the Title IX regulations which bar sex discrimination in employment at educational institutions. Such a suit, however, would be difficult.

C. Title IX Problems

1. Private Right of Action

Even if a school district's practices are precisely those forbidden by the Title IX regulations, a plaintiff may still face insurmountable barriers. The first hurdle may be showing a private plaintiff has a right to sue at all. Like Title VI, Title IX has no explicit provision for a lawsuit brought by private individuals. However, courts for ten years have held Title VI includes an implicit private right of action. The leading case is Bossier Parish Schools v. Lemon, 370 F. 2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967), which decided "private citizens as beneficiaries of the Act. have standing to assert their [Title VI] rights." 370 F. 2d at 852. Since Bossier, courts have explicitly found individual plaintiffs have a right to sue under Title VI, Uzell v. Friday, 547 F. 2d 801, 803 (4th Cir. 1977); Laufman v. Oakley Building and Loan Co., 408 F. Supp. 489, 498-499 (S.D. Ohio 1976); Natanbah v. Board of Education, 355 F. Supp. 716 724 (D.N.M. 1973), and assumed such a right by consistently deciding Title VI cases brought by private citizens, Lau v. Nichols, 414 U.S. 563 (1974); Garrett v. City of Hamtramek, 503 F. 2d 1236 , 1247 (6th Cir. 1974); Serna v. Portales Municipal Schools, 499 F. 2d 1147, 1152-1153 (10th Cir. 1974); Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976). Courts hearing Title IX suits had followed the lead of Title VI courts. Piasik v. Cleveland Art Museum, 426 F. Supp. 779, 781 (N.D. Ohio 1976); Trent v. Perritt, 391 F. Supp. 171, 173 (S.D. Miss. 1975); cf., Berkleman v. San Francisco Unified School District, 501 F. 2d 1264, 1269 (9th Cir. 1974); Stewart v. N.Y.U., 430 F. Supp. 1305(S.D.N.Y. 1976).

All of this changed with Cannon v. University of Chicago, 559 F. 2d 1063 (7th Cir. 1976), aff'd en banc, 559 F. 2d 1077 (7th Cir. 1977), petition for cert. filed Dec. 28, 1977 (46 U.S.L.W. 3438). Cannon is a suit on behalf of a woman refused admission to private medical schools. Her complaint

alleges violations of various laws including Title IX.

In a radical departure from previous decisions, the Seventh Circuit in Cannon decided that, as a private individual, the plaintiff had no right to bring a Title IX action. The court did not decide the case by distinguishing Title IX law from well-established Title VI precedent; rather, the court reread and misread the whole body of Title VI law. The court said that private Title VI suits could be brought, if at all, only on behalf of a large number of private individuals. Besides, the Cannon court continued, Title VI cases were really Fourteenth Amendment cases, even those explicitly deciding the private right of action question and even those never mentioning 42 U.S.C. §1983 or the Constitution.

Lower courts, for the most part, seem to be following Cannon. See Leake v. Cincinnati University, 14 FEP Cases 1 (S.D. Ohio 1976); Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds, 563 F. 2d 793 (6th Cir. 1976); Lodwig v. Board of Education, C.A. No. 76-604 (N.D. Ohio, March 31, 1977), appeal pending, (6th Cir. No. 77-3375); cf., McCarthy v. Burkholder, C.A. No. 75-136-C6 (Feb. 2, 1978), in which a court modified its own ruling, 15 FEP Cases 682 (D. Kan. 1977), denying a Title IX defendant's motion to dismiss and holding that Title IX did imply a private right of action. In modifying its decision, the court concluded, without citations or extensive reasoning, that the only sanction for a Title IX violation is withdrawal of federal funds.

On the other side of the ledger is Alexander v. Yale University, C.A. No. 77-277 (D. Conn., Dec. 21, 1977). There the court, in a well-reasoned decision, explicitly declined to follow Cannon. Instead, the court applied the Cort v. Ash, 422 U.S. 66 (1975),[8] test and refused to dismiss the action because there was "good reason to believe that to leave [plaintiff] to her administrative remedy would be an empty

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8 For a thorough exploration of the Cort v. Ash test, see Memorandum in Opposition to Defendants' Motion to Dismiss.

exercise." Slip Op. at 11.[9] See Grossman v. Texas Tech University, C.A. No. 5-77-23 (N.D. Texas, Order, Nov 18, 1977) (no opinion).

Cannon and its progeny have become a formidable barrier to Title IX suits like the one proposed in the model pleadings. The model Memorandum in Opposition to Defendants' Motion to Dismiss suggests ways to argue around Cannon. They might not be winning arguments.[10]

2. Exhaustion of Administrative Remedies

An equally serious question is whether and to what extent a private plaintiff suing under Title IX is required to exhaust administrative remedies before bringing a case in federal court. A substantial body of Title VI law supports the proposition that some exhaustion of remedies is necessary. Green Street Association v. Daley, 373 F. 2d 1, 8-9 (7th Cir. 1967), cert. denied, 387 U.S. 932 (1967); NAACP v. Wilmington Medical Center, Inc., 426 F. Supp. 919, 924-925 (D. Del. 1977); Johnson v. County of Chester, 413 F. Supp. 1299, 1310 (E.D. Pa. 1976); Mendoza v. Lavine, 412 F. Supp. 1105, 1107-1109 (S.D.N.Y. 1976); Green v. Cauthen, 379 F. Supp. 361, 378-379 (D.D.C. 1974); Feliciano v. Romney, 363 F. Supp. 656,672-673 (S.D.N.Y. 1973); Dupree v. City of Chattanooga, 362 F. Supp. 1136, 1141-1142 (E.D. Tenn. 1973); North Philadelphia Community Board v. Temple University, 330 F. Supp. 1107, 1110-111 (E.D. Pa. 1971); Powelton Civic Home Owners Association v. HUD, 284 F. Supp. 809, 818 (E.D. Pa. 1968). At least one Title IX decision reached the same conclusion. Cape v. Tennessee Secondary School Athletic Association, 424 F. Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds, 563 F. 2d 739 (6th Cir. 1976). Contra Alexander v. Yale University, C.A. No. 77-277 (D.Conn., Jan. 31, 1978).

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9 The Alexander court relied substantially on amicus briefs by HEW and by WEAL (Women's Equity Action League) and other women's groups. These are good allies and should be enlisted if a battle develops over the private right of action.

The Center for Law and Social Policy is principally responsible for the WEAL amicus brief. Actively interested in the Title IX private right of action, the Center should be consulted for help and advice. The Center's address is 1751 N Street, N.W., Washington, D.C. 20036.

10 A word of warning: watch for new decisions. The issues have not yet been resolved and judges at various levels in the federal judiciary are actively considering the question. Lodwig, for example, is on appeal, and the plaintiff in Cannon has filed a petition for certiorari.

The most obvious way to solve an exhaustion problem is to pursue administrative remedies before turning to the courts. The plaintiff in a case like the one we propose should file a Title IX complaint as soon as possible.[11] This can be done by sending a letter to the regional office of HEW describing the kind of discrimination and the institution or individuals who have discriminated. This may bring results. Federal Title IX enforcement efforts in the past have been dismal, but this may be changing. HEW has just signed a consent decree in a case filed by women's groups to compel better Title IX enforcement. WEAL v. Califano, C.A. No. 74-1720 (D.D.C., order, Dec. 29, 1977).[12] If the settlement works as plaintiffs hope, backlogs should be cleared up within two years and HEW's performance should improve immediately.

But the federal enforcement mechanism, even at its best, may not solve the problems of this particular plaintiff. Waiting for HEW to make an investigation, come to conclusions, and attempt voluntary compliance takes time, even if HEW works efficiently. The model pleadings have assumed the plaintiff is in real distress: she wants to play soccer, the school has said no, and the season is slipping away. Meaningful relief, in that case, must be immediate relief.

If there is no time to use the administrative process, the best, although admittedly imperfect, answer may be to file a complaint with Title IX allegations and hope defendants do not raise the exhaustion issue immediately.

The Model Memorandum in Response to Defendants' Motion to Dismiss suggests lines of defense when and if the exhaustion issue is raised. A word of warning is in order. The Memorandum assumes HEW will continue to handle Title IX complaints

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11 Indeed, a Title IX complaint should be made even if no lawsuit is planned. Simply making the complaint should set the federal enforcement mechanism in motion. If it in fact does, Title IX compliance perhaps can be achieved without a private lawsuit. If it does not, then a record is made of the need for more forceful federal efforts.

12 A copy of this settlement is available from the ACLU Women's Right's Project, which now has an extensive clearinghouse of pleadings in women's rights cases.

as it has in the past--slowly, if at all. This may be a false assumption in light of the settlement in Weal v. Califano, supra.

In arguing against requiring exhaustion, an attempt should first be made to distinguish cases requiring exhaustion on the facts. Neither statutes nor regulations spell out what exhaustion is required for private individuals seeking injunctive or declaratory relief under Title VI or Title IX. Indeed, the law is vague on the entire subject of private suits-hence the private right of action problem. Having no authority that defines exhaustion, courts have been forced to examine the facts of each particular case and, to some extent, base their decisions on what the plaintiffs and the administrative agency had--or had not--done. In Johnson v. County of Chester, supra, for example, the plaintiff had ignored agency procedures and, according to the court, the agency was making a reasonable effort to secure voluntary compliance. In Green v. Cauthen, supra, HEW was actively investigating charges like those made by the plaintiffs. And in Powelton Civic Home Owners Association v. HUD, supra, the plaintiffs never replied to the agency response to their initial complaint. See Mendoza v. Lavine, supra; NAACP v. Wilmington Medical Center, supra.

Second, an attempt can be made to distinguish authority on the basis of the kind of relief requested. Most of the Title VI cases requiring exhaustion are suits to compel officials to terminate federal funding. Here the plaintiff asks for relief to end the discrimination, not to end the funding. Regulations do describe in detail agency procedures necessary before withdrawing federal funds. 45 C.F.R. 80.8-80.11. In fact, one of the cases widely cited for the proposition that exhaustion is required more properly stands for the proposition that private parties cannot, under any circumstances, compel the federal government to withhold funds. Green Street Association v. Daley, 373 F. 2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967).

This argument does have problems. It has been explicitly rejected by at least one court. Mendoza v. Lavine, 412 F. Supp. at 1109, n. 2. And, given the statutory and regulatory scheme, some attempt to use administrative procedures does make sense.

Third, Alexander v. Yale University, C.A. 77-277 (D. Conn., Jan. 31, 1978), should be used aggressively. In Alexander, plaintiffs made no attempt to exhaust administrative remedies before filing a Title IX suit. The court, nonetheless, refused to dismiss the action because, the court found, the administrative remedies might prove futile. "Good reason to believe" administrative remedies would be futile, not a showing they were in fact useless, was sufficient to defeat the motion to dismiss. HEW's poor record was part of the court's reason for doubting the efficacy of turning to HEW for Title IX enforcement. The court, however, also looked to the specific facts of the case and found administrative action, even if efficient, might not be quick enough to remedy plaintiff's particular grievance.

IV. STATE CLAIMS

Challenges to sex discrimination in athletics should include pendent state claims whenever possible. State ERA's are an obvious place to look for useful state law. Nine states have ERA's closely patterned after the proposed federal amendment. They are Colorado, Hawaii, Massachusetts, Maryland, New Hampshire, New Mexico, Pennsylvania, Texas and Washington. Girls in three of these states, Pennsylvania, Colorado and Washington, have successfully used their state ERA's to challenge discrimination in athletics. Commonwealth v. Pennsylvania Interscholastic Athletic Association, 334 A. 2d 839 (Cmwlth. Ct. 1975); Moro v. St. Vrain Valley School District, Civ. No. 75-3182-1 (Boulder Co., Colo. filed Dec. 3, 1975); Darrin v. Gould, 85 Wash. 2d 859, 540 P. 2d 885 (Sup. Ct. 1975). See also Opinion of the Justices, ____ Mass. ___ (1977 Adv. Sh. 2728), an advisory opinion of the Supreme Judicial Court of Massachusetts, concluding that a legislative proposal barring all women from participating in certain contact sports would violate the state ERA.

A federal judge, faced with a pendent claim under a state ERA, may choose to decide the case on other grounds. "[P]endent jurisdiction is a doctrine of discretion, not a plaintiff's right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Since the federal claims are an alternative ground for deciding the case and courts exercising pendent jurisdiction should avoid "needless decisions of state law," id., the chances of a court making a state ERA ruling are probably slim. The allegation should, however, be included on the chance that it might persuade an otherwise unsympathetic judge.

If a judge seems interested in the state ERA claim, the issue should be briefed with care. According to federal ERA legislative history, the standard of review under the ERA would be different and stricter from that under the Fourteenth Amendment.[13] The ERA would establish a principle of absolute equality under law which would permit narrow qualifications only for the constitutional right to privacy and for unique physical characteristics. State ERA cases, which may well form the basis for later adjudication under the federal ERA, must argue this point cogently.[14]

Possible state statutory claims should also be explored.

V. CLASS ACTIONS

Whether brought under the Fourteenth Amendment and 42 U.S.C. §1983, Title IX, or state law, suits may become moot before a decision on the merits is reached. The girl who happens to contact a lawyer may be a graduating senior who wants to play baseball in her last semester at high school; the litigation may drag on while defendants present doctors to show girls are more prone to injury, or plaintiffs exhaust Title IX administrative remedies; and a decision from an appellate court may take years--by which time, even a plaintiff who was 14 when she first tried out for soccer may have graduated. For these reasons, bringing the case as a class action should be considered.

Class actions, however, present their own problems. One of

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13 The definitive statement on the ERA standard of review is found in a Yale Law Journal article: Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 871 (1971). This article was read into the Congressional Record during consideration of the ERA and the standard of review it proposes was adopted by the ERA's Congressional proponents.

14 Two resources should be consulted for state ERA work. The first is a book: Brown, et al., Women's Rights and the Law: The Impact of the ERA on States' Laws (1977). The second is the Women's Law Project, 112 So. 16th Street, Philadelphia, PA (215/564-6280), which has a treasure of state ERA knowledge. Alice Price and Susan Nicholas are the attorneys there.

them may be meeting the Rule 23(a) prerequisites.[15] Difficulties may arise in showing the class is so numerous that joinder is impracticable. If the class is narrowly drawn, the plaintiff may find that the number of girls who want to and are capable of playing interscholastic athletics with boys is very small. Including girls who in the future will want to play soccer in the class is one solution. In employment discrimination cases, potential class members with claims arising in the future have been included to augment the size of the class and meet the Rule 23 (a)(1) requirement. Jack v. American Linen Supply Co., 498 F. 2d 122, 124 (5th Cir. 1974).

Defining the class broadly to avoid Rule 23(a)(1) problems may create other difficulties. A broad definition may bring challenges to the plaintiff's ability to represent the interests of the class as required by Rule 23(a)(4). A girl who thinks separate athletics teams answer the needs of female athletes better than integrated teams may claim this plaintiff does not represent her. Or worse, a challenge may be made by a girl hostile to the whole idea of vigorous, competitive athletics programs for girls.

Class actions present other complications. Settlements may need court approval, counsel's conduct may be subject to closer court scrutiny, and an adverse decision may hamper other attempts to achieve sexual equality in athletics. In short, while class action certification may solve mootness problems, it may create others; the decision to proceed or not to proceed as a class should be weighed carefully.

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15 At least one successful challenge to discriminatory athletic association rules was maintained as class action, but there defendants conceded the class action prerequisites had been met. Hoover v. Meiklejohn, 430 F. Supp. 164, 165 (D. Colo. 1977).

VI. CONCLUSION

We hope these model pleadings and long-winded explanations are useful.

The Women's Rights Project stands ready to help at whatever stage you need us. Call on us for information, litigation advice, or just encouragement. Our clearinghouse of women's rights cases is an additional resource you should draw on.

Good luck and let us know what happens.

APPENDIX - RESOURCES

This is a list of some of the resources I used putting together these materials; it does not purport to be an exhaustive survey, only a summary of leads I found most helpful.

ACLU, Women's Rights Project, 22 East 40th Street, New York, New York 10016 [(212) 725-1222]: Back-up litigation assistance; clearinghouse of women's rights cases.

Center for Law and Social Policy, 1751 N. St., N.W., Washington, D.C. 20036 [(202) 872-0760]: Title IX implied right of action and Title IX enforcement. The Center is playing a leading role in the battle for an implied right of action under Title IX and has a wealth of useful knowledge and materials. The Center also represents the plaintiffs in WEAL v. Califano, the suit to compel HEW to enforce Title IX.

PEER (Project for Equal Education Rights), 1029 Vermont Ave., N.W., Suite 800, Washington, D.C. 20005 [(202) 332-7337]: Title IX. PEER, which is a project of the NOW Legal Defense and Education Fund, monitors progress under federal laws forbidding sex discrimination in education. PEER and its newsletter, PEER Prospective, are good resources for up-to-date Title IX information.

SPRINT (Sports Project Referral and Information Network to Achieve Education Equity), WEAL Fund, 805 15th St., N.W., Washington, D.C. 20005 [(202) 638-1961]: women and sports. SPRINT is a national clearinghouse, collecting and coordinating information on sexual equality and sports. In The Running, SPRINT's newsletter, is rich with ideas and information.

Women's Law Project, 112 16th South St., Philadelphia, Pa. [(215) LO 4-6280): state ERA's. The Women's Law Project has developed a vast and useful store of information on litigating and enforcing state ERA's.

Women's Rights Project
American Civil Liberties Union

22 East 40th Street • New York, New York 10016 • (212) 725-1222

FROM: Jill Laurie Goodman, WOMEN'S RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION

RE : COMPLAINT: Model Pleadings for A Suit On Behalf Of a Girl Who Wants To Play Soccer On Her High School's All Male Soccer Team.

DATE: June, 1978

MODEL PLEADINGS

UNITED STATES DISTRICT COURT
FOR THE _____

SUSAN SMITH, by her Mother and next friend, MARION SMITH, 1/ Plaintiff, v. MIDDLETOWN SCHOOL DISTRICT; 2/ LESLEY SUPERINTENDENT, Superintendent of Middletown School District, individually and in his official capacity; MARY PRINCIPAL, Principal of South High School, individually and in her official capacity; JOHN COACH, Coach at South High School, individually and in his official capacity; 3/ STATE ATHLETIC ASSOCIATION; 4/ STEPHEN PRESIDENT, President of the Board of Directors of State Athletic Association, individually and in his official capacity; DAVID CHAIR, Chairperson of the Committee on Rules and Regulations of the State Athletic Association, individually and in his official capacity; 5/ MARTHA COMMISSIONER, Commissioner of Education of State, individually and in her official capacity, 6/ Defendants.	COMPLAINT CIVIL ACTION NO._____

PRELIMINARY STATEMENT

1. This action, brought pursuant to the Fourteenth Amendment, 42 U.S.C. §1983, and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, seeks to secure plaintiff's right to the equal protection of the laws and to an education free from sex discrimination. Defendants have denied plaintiff the opportunity to play interscholastic soccer solely on the basis of her sex. Plaintiff seeks declaratory and injunctive relief to restrain defendants from discriminating against her in violation of her constitutional and statutory rights.

JURISDICTION

2. This court has jurisdiction of this action under 28 U.S.C. §§1331, 1337 and 1343 (3) and (4). The amount in controversy exceeds $10,000.

PARTIES

3. Plaintiff Susan Smith is a female student in the 9th grade at South High School, a public school under the supervision and control of defendant Middletown School District. She sues by her mother and next friend, Marion Smith.

4. Except for her sex, plaintiff meets all qualifications for membership on South High School's junior varsity soccer team, the Freebooters.

Defendant Middletown School District

5. Defendant Middletown School District (School District) is the political subdivision of State with the power and authority to operate public schools within the town of Middletown.

6. Defendant School District is an educational institution receiving Federal financial assistance. It is covered by Title IX of the Civil Rights Act of 1972, 20 U.S.C. §1681, et seq.[7/]

7. Defendant School District has ultimate responsibility for the content and conduct of the interscholastic sports program at South High School.

8. Defendant School District sponsors an extensive high school athletics program, which includes interscholastic soccer. This program is an integral and important part of the School District's educational curriculum. The program promotes the physical, emotional and social growth of the School District's students; it helps develop strength of character and leadership qualities as well as physical strength, skills and agility.

9. South High School, under the supervision and control of Defendant School District, sponsors an all-male soccer program. Except for plaintiff, no female has played on any of South High School's soccer teams. South High School sponsors no girls' soccer team and no mixed-sex soccer team.

10. Schools under the supervision and control of defendant School District are members of Defendant State Athletic Association. Defendant School District permits and facilitates participation in Athletic Association activities and events and considers them part of its educational program.[8/]

Defendants Superintendent, Principal and Coach

11. Defendant Lesley Superintendent is superintendent of the Middletown School District. He has responsibility for the conduct of all schools and programs within Middletown School District.

12. Defendant Mary Principal is principal of South High School. She has responsibility for the conduct of all programs within South High School, including interscholastic sports programs.

13. John Coach is coach of the Freebooters Junior Varsity Soccer Team. He has direct responsibility for the conduct of the South High School's soccer program, including the Freebooters.

Defendant State Athletic Association

14. Defendant State Athletic Association (Athletic Association) is an unincorporated association, composed of schools within State; it directs, regulates, and promotes interscholastic athletics among its member schools.[9/]

15. Defendant Athletic Association is an agent and instrumentality of its member schools. Most of defendant Athletic Association's members are state-operated schools. Employees and officials of member schools govern defendant Athletic Association by voting, office-holding, and representation on policy-making bodies.

16. Rules, made by defendant Athletic Association concerning the conduct of athletics programs at member schools, bind all members. Defendant Athletic Association enforces such rules by imposing sanctions which include forfeiture of games and expulsion from the defendant Athletic Association.

17. Revenues for defendant Athletic Association activities are derived from dues paid by member schools and gate receipts from contests between members, held principally on state-owned property.[10/]

18. Defendant Athletic Association is an educational institution receiving Federal financial assistance.[11/] It is covered by Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq.

Defendants President and Chair [12/]

19. Stephen President is president of the Board of Directors of defendant State Athletic Association. He has ultimate responsibility for the conduct of defendant Athletic Association.

20. David Chair is chairperson of the Committee on Rules and Regulations of defendant State Athletic Association. He is responsible for the committee of the Athletic Association which enacts and enforces the rules and regulations which govern the conduct of the Athletic Association, athletic events sponsored by the Association or member schools, and athletic programs within member schools.

Defendant Commissioner [13/]

21. Defendant Martha Commissioner is the Commissioner of Education of State. She has ultimate responsibility for the conduct of educational programs of public schools within State.

STATEMENT OF CLAIM

22. On or about September 1, 1979, plaintiff tried out for the Freebooters, South High School's junior varsity interscholastic soccer team. The Freebooters is part of defendant School District's overall athletics program.

23. At the time plaintiff tried out for the team, the Freebooters had no female members. South High School has no girls' intramural or interscholastic soccer team.

24. On or about September 1, 1979, defendant John Coach invited plaintiff to join the Freebooters. During September, 1979, plaintiff participated in the activities of the Freebooters as a full member of the team.

25. On or about October 1, 1979, directly before the Freebooters' first game of the season, defendant Coach told plaintiff that she could not play in the game because the opposing team refused to compete against girls. According to defendant Coach, the opposing team threatened to ask defendant Athletic Association to impose sanctions on the Freebooters for permitting plaintiff to play.

26. On or about October 2, 1979, plaintiff and her parents, Michael and Marion Smith, met with defendant Mary Principal. At that time, defendant Principal told plaintiff that she would not be permitted to play on the Freebooters because her participation would violate defendant Athletic Association's rule against mixed-sex competition in soccer and subject South High School to disciplinary actions by defendant Athletic Association. Defendant Principal said she had consulted with defendant Lesley Superintendent who agreed that plaintiff could not be permitted to play on the Freebooters.

27. Since October 2, 1979, plaintiff has not been permitted to participate in activities of the Freebooters solely because of her sex. As a result, she is losing valuable opportunities to develop physical skills and strength, and learn the art of team competition.

28. Rule 2 of the bylaws of defendant Athletic Association states:

> Girls may not play on the same team as boys or compete against boys in the following sports: soccer, boxing, rugby, wrestling, ice hockey, baseball, basketball, lacrosse, and football.

29. On information and belief, defendant Athletic Association imposes sanctions on member schools for violations of rules.

30. As a result of defendant Athletic Association's Rule 2 and defendant Athletic Association's power to impose sanctions on member schools, girls attending schools which are members of defendant Athletic Association are effectively barred from playing on the same team or competing against boys in interscholastic soccer.

FIRST CAUSE OF ACTION

31. By promulgating and enforcing rules which have the intent and effect of denying plaintiff the opportunity to compete in interscholastic soccer, defendants have denied plaintiff a valuable educational experience. This denial, based solely on plaintiff's sex, is a denial of the equal protection of the laws, and violates the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §1983.

SECOND CAUSE OF ACTION

32. By promulgating and enforcing rules which have the intent and effect of denying plaintiff the opportunity to compete in interscholastic soccer, defendants have excluded plaintiff from participation in, denied her the benefits of, and subjected her to discrimination under education programs and activities receiving Federal financial assistance. This discrimination, based solely on plaintiff's sex, violates Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, et seq.

RELIEF

WHEREFORE, plaintiff demands:

A. A declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202, that defendants, by promulgating and enforcing rules forbidding girls from playing or competing with

boys in interscholastic soccer, have denied plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. 1983 and have discriminated against plaintiff on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq.

B. An injunction directing defendants to cease enforcing rules which forbid girls from playing or competing with boys in interscholastic soccer;

C. An injunction directing defendants to permit plaintiff to play on South High School's Freebooters Junior Varsity Soccer Team;

D. An award of the costs of this litigation, including reasonable attorney's fees pursuant to 42 U.S.C. §1988; and

E. Such other and further relief as this court shall deem just and proper.

Dated:

_____

Attorneys for Plaintiff

FOOTNOTES - COMPLAINT

1/ A minor must sue by a next friend, appointed representative, or guardian ad litem. Fed. R. Civil P. 17(c).

2/ The School District is an appropriate defendant in both the 42 U.S.C. §1983 and the Title IX claim. The Supreme Court has recently settled the previously troublesome question of whether school boards could be sued under §1983: school boards are "persons" within the meaning of §1983, liable in suits for damages as well as suits for declaratory and injunctive relief. See Memo to Attorneys, Sec. II C. For purposes of the Title IX claim, the School District is the recipient of federal funds which has the duty to refrain from discrimination and the proper party to sue for a breach of that duty.

3/ Individual officials within the school district should also be made defendants in the §1983 claim. Recent Supreme Court interpretations of §1983 leave open the possibility that the school district will escape liability. Additionally, the school district's status as a defendant may provide some indirect advantages in negotiations or procedural maneuvers. See Memo to Attorneys, Sec. II C.

Which individuals should be sued presents a separate question. The defendants should be the officials with the authority to get plaintiff on the team and violate the

Athletic Association rules if necessary. Probably these individuals are either (1) the employees of the school district - the superintendent, principal or coach - or (2) the officials of the school board or other political or governmental body which has the power to make policy. An examination of lines of authority and responsibility established by statute, regulation or ordinance may be necessary to resolve this question.

Another question to consider in choosing among possible defendants is the best use of natural allies. A coach, for example, may want the plaintiff on his team. In that case, suing him, unless absolutely necessary, would be unwise.

4/ The Athletic Association, like the School District, should be a defendant in both the 42 U.S.C. §1983 and the Title IX causes of action. See Note 2, supra, and Memo to Attorneys.

5/ Individual officials of the Athletic Association should also be sued to avoid possible §1983 problems. See Note 3, supra. The defendants should be the officials with the power to make and enforce rules. Probably the highest ranking official, e.g. the president or chair, should be one of the defendants. Which other individuals should be sued depends on the structure of the Association. A charter, constitution, or by-laws will probably provide the answer.

6/ A state official may have to be sued. If the Athletic Association or its rules have any official state status or function, then a state defendant may be necessary for complete relief.

7/ Title IX regulations define Federal financial assistance broadly. See 45 CFR 86.2(g). It includes, for example, grants or loans for construction or repair of buildings, scholarship aid awarded directly to students, and the provision of services by federal employees.

8/ This allegation is included because Title IX regulations require the recipient of federal funds to make sure programs in which they participate are free from discrimination. See 45 CFR 86.31(d). Thus, the school district must take steps to make sure the Athletic Association does not discriminate or else it must withdraw from participation.

9/ The Athletic Association's charter, constitution or by-laws will probably include a statement of purpose which may be used for these allegations.

10/ The allegations in ¶¶ 15-17 are included to establish the facts necessary to show that the activities of Athletic Associations are state action which subject them to the Fourteenth Amendment. See Memo to Attorneys, Sec. IIB3.

11/ See note 7, supra.

12/ The Athletic Association's charter, constitution or by-laws should describe the duties of its various officials which should be used for these allegations.

13/ State law should define the duties and responsibilities of the Commissioner of Education.

Jill Laurie Goodman
June, 1978

Women's Rights Project
American Civil Liberties Union

22 East 40th Street • New York, New York 10016 • (212) 725-1222

FROM: Jill Laurie Goodman, WOMEN'S RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION

RE: ORDER TO SHOW CAUSE and TEMPORARY RESTRAINING ORDER: Model Pleadings for A Suit On Behalf Of a Girl Who Wants To Play Soccer On Her High School's All Male Soccer Team.

DATE: June, 1978

UNITED STATES DISTRICT COURT
FOR THE _____

SUSAN SMITH, by her Mother and Next Friend, Marion Smith,	:	Civil Action No. _____
Plaintiff,	:	
-against-	:	
MIDDLETOWN SCHOOL DISTRICT, et al.,	:	
Defendants.	:	

O R D E R [1]

Upon the complaint and annexed affidavits of _____ [2] it is

ORDERED, that defendants show cause in room ____ of the United States Courthouse on _____ at _____ a.m./p.m. why a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, should not issue enjoining defendants, their agents, employees and successors, pending final hearing and determination of this action, from:

1. Preventing or obstructing Susan Smith from playing with South High School's Freebooter's Junior Varsity Soccer Team as a full member of the team and competing in interscholastic soccer; and

2. Imposing sanctions or penalties on South High School or the Freebooter's Junior Varsity Soccer Team for permitting Susan Smith to play With South High School's Freebooter's Junior Varsity Soccer Team as a full member of the team and compete in interscholastic soccer.

It appearing that defendants have committed and will continue to commit the acts set forth below to the irreparable injury of plaintiff, it is further

ORDERED, that pending determination of plaintiff's motion for a preliminary injunction defendants, their agents, employees and successors be and hereby are restrained from:

1. Preventing or obstructing Susan Smith from playing with South High School's Freebooter's Junior Varsity Soccer Team as a full member of the team or competing in interscholastic soccer; or

2. Imposing sanctions or penalties on South High School or the Freebooter's Junior Varsity Soccer Team for permitting Susan Smith to play with South High School's Freebooter's Junior Varsity Soccer Team as a full member of the team and compete in interscholastic soccer: and it is further

ORDERED, that service of this order to show cause together with a copy of the annexed papers on defendants on or before _____, 1979, at _____ o'clock be deemed sufficient service.

_____
United States District Judge

FOOTNOTES: ORDER TO SHOW CAUSE

1/ Proceeding by Order to Show Cause is only one possibility. The same effect can be accomplished by making a motion for a Temporary Restraining Order and a separate motion for a Preliminary Injunction. Indeed some district courts prefer the two separate orders. Check the local rules.

2/ Supporting affidavits are necessary. See Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, footnotes 1-3.

Women's Rights Project
American Civil Liberties Union

22 East 40th Street • New York, New York 10016 • (212) 725-1222

FROM: Jill Laurie Goodman, WOMEN'S RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION

RE: MEMORANDUM in SUPPORT of PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION: Model Pleadings for a Suit On Behalf of a Girl Who Wants To Play Soccer On Her High School's All Male Soccer Team.

DATE: June, 1978

UNITED STATES DISTRICT COURT
FOR THE _____

SUSAN SMITH, by her Mother and Next Friend, MARION SMITH,	:	
Plaintiff,	:	Civil Action
v.	:	No. _____
MIDDLETOWN SCHOOL DISTRICT, et al.,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

[Attorneys for Plaintiff]

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TABLE OF AUTHORITIES

CASES: Page

Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346 (M.D. Ala. 1967) . . . . . [illegible]

Bednar v. Nebraska School Athletic Association, 531 F. 2d 922 (8th Cir. 1976) . . . . . [illegible]

Blackshear Residents Organization v. Housing Authority of Austin, 347 F. Supp. 1138 (W.D. Tex. 1972) . . . . . [illegible]

Brenden v. Independent School District, 477 F. 2d 1292 (8th Cir. 1973) . . . . . [illegible]

Brown v. Choate, 411 U.S. 452 (1973) . . . . . [illegible]

Buchanan v. U.S. Postal Service, 508 F. 2d 259 (5th Cir. 1975) . . . . . [illegible]

Califano v. Goldfarb, 430 U.S. 199 (1977) . . . . . [illegible]

Carnes v. Tennessee Secondary Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976) . . . . . [illegible]

City of Los Angeles v. Manhart,____ U.S.____, 46 U.S. L.W. 4347 (April 25, 1978) . . . . . [illegible]

Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) . . . . . [illegible]

Craig v. Boren, 429 U.S. 190 (1976) . . . . . [illegible]

Fortin v. Darlington, 514 F. 2d 344 (1st Cir. 1975) . . . [illegible]

Gilpin v. Kansas State High School Activities Association, Inc., 377 F. Supp. 1233 (D. Kansas 1974) . . [illegible]

Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) . . . . . [illegible]

Kampmeier v. Nyquist, 553 F. 2d 296
(2d Cir. 1977) . . . . . .

Lee v. Macon County Board of Education, 270 F. Supp. 859
(M.D. Ala. 1967) . . . . . .

Leffel v. Wisconsin Interscholastic Athletic
Association, No. 75-C-174 (E.D. Wisc.,
Jan. 19, 1978) . . . . . .

Louisiana High School Athletic Association v.
St. Augustine High School. 396 F. 2d 224
(5th Cir. 1968) . . . . . .

Moreland v. Western Pennsylvania Inter-
scholastic Athletic Association League,
46 U.S.L.W. 241 (3d Cir. 1978) . . . . . .

Morris v. Michigan State Board of Education,
472 F. 2d 1207 (6th Cir. 1973) . . . . . .

New York Pathological & X-Ray Lab., Inc. v.
Immigration & Nationalization Service,
523 F. 2d 79 (2d Cir. 1975) . . . . . .

Oklahoma High School Athletic Association v.
Bray, 321 F. 2d 269 (10th Cir. 1963) . . . . . .

Reed v. Nebraska School Activities Association,
341 F. Supp. 258 (D. Neb. 1972) . . . . . .

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) . . . . . .

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UNITED STATES DISTRICT COURT
FOR THE _____

SUSAN SMITH, by her Mother and Next Friend, Marion Smith, Plaintiff, -against- MIDDLETOWN SCHOOL DISTRICT, et al., Defendants.	Civil Action No. _____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Preliminary Statement

Plaintiff seeks declaratory and injunctive relief under the Fourteenth Amendment, 42 U.S.C. §1983, and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. She seeks to enforce her constitutional and statutory rights and to secure a position on her school's interscholastic soccer team. Defendants have refused to permit plaintiff to play soccer for one reason and one reason alone - because she is a girl.

Plaintiff filed the complaint in this action on October 9, 1979 and immediately moved for a temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure. This court signed the order granting the temporary relief on October 9, 1979.

Statement of Facts [1]

Plaintiff Susan Smith, a student at South High School in Middletown, State, wants to play soccer on her school's only junior varsity soccer team, currently an all male team. Aff. of Susan Smith ¶3.[2] Although she is a good athlete and a promising soccer player, defendants have made and enforced rules which prevent all girls, including plaintiff, from competing with boys in interscholastic soccer.

South High School sponsors an extensive soccer program, including after school intramural and interscholastic teams. See "Welcome to South High School," attached as Exhibit A.[3] This program and others like it in different sports are part of an overall athletics program which the school and defendant Middletown School District (School District) consider an integral and important part of Middletown's educational program. Acknowledging the importance of the after-school athletics program, the School District spends substantial sums derived from taxes to buy equipment, pay coaches, maintain playing fields, and sponsor competitive events.

South High School's soccer program functions according to rules and regulations of defendant State Athletic Association (Athletic Association). The Athletic Association is an unincorporated association organized to direct, regulate and promote interscholastic athletic programs within State. It is composed of member schools, the overwhelming majority of them public schools, like South High School. Employees and officials of member schools govern the Association by voting, office-holding and representation on policy-making bodies. Rules made by the Association concerning the conduct of athletic events bind all members. The Association enforces these rules by imposing sanctions ranging from forfeiture of games to expulsion from the Association. Revenues for Athletic Association activities are derived from dues paid by member schools and gate receipts from contests between members, held principally on state-owned property.

The soccer program has traditionally been all male. Since its start in 1970, no girl had tried out for the school's soccer team until plaintiff, a ninth-grade student at South High School, decided she wanted to play competitive soccer. The School District sponsors no girls' teams and no mixed-sex teams. Once plaintiff decided she wanted to play, she had no choice but to try out for the boys' teams.

On September 1, 1979, plaintiff, along with other high school students interested in the school's junior varsity soccer team, the Freebooters, met with defendant John Coach, the team's coach, for try outs. At the end of the day's session, defendant Coach invited plaintiff to join the team.

After practicing with the Freebooters for a month as an equal and valued member of the team, plaintiff faced her first interscholastic match on October 1, 1979. When she arrived on the field, prepared to play halfback, defendant Coach called her aside and told her she could not play. The problem, defendant Coach explained, involved Rule 2 of the by-laws of defendant Athletic Association. Rule 2 states:

> Girls may not play on the same team as boys or compete against boys in the following sports: soccer, boxing, rugby, ice hockey, wrestling, baseball, basketball, lacrosse, and football.

According to defendant Coach, the coach of the opposing team had approached him and told him his team would never play against a team with a girl on it. The opposing coach told defendant Coach that plaintiff's participation violated Athletic Association rules and said he would seek sanctions against the Freebooters if they tried to play with plaintiff on the team. Defendant Coach explained to plaintiff that, in his view, he had no choice in the matter. Plaintiff did not play soccer with her team on October 1, 1979.

Disturbed by the plaintiff's exclusion from the playing field, plaintiff and her parents, Michael and Marion Smith, met with defendant Coach and defendant Mary Principal, principal of South High School, on October 2, 1979. At the meeting defendant Principal explained that South High School was a member of defendant Athletic Association and bound by the Association's rules, including its rule against mixed-sex interscholastic soccer. For that reason, defendant Principal said, plaintiff would have to give up her place on the Freebooters to a boy who could participate in interscholastic competition. Defendant Principal said she had consulted with defendant Lesley Superintendent, Superintendent of Middletown School District, who had agreed that plaintiff could no longer be permitted to play with the Freebooters.

Since that meeting plaintiff has been excluded from soccer at South High School. As a result, plaintiff is losing valuable opportunities to develop skills as a soccer player, to build strength and dexterity as an athlete, and to learn the art of team competition. These opportunities are permanently lost. Since the soccer season is only 12 weeks long and 6 of those weeks have already passed, plaintiff risks losing the educational benefits of an entire season.

Plaintiff now seeks injunctive relief to secure her right to participate in interscholastic soccer free from unfair and unconstitutional discrimination on the basis of her sex.

ARGUMENT

PLAINTIFF's MOTION FOR PRELIMINARY RELIEF MUST BE GRANTED AND PLAINTIFF PERMITTED TO PLAY ON HER PUBLIC HIGH SCHOOL'S ONLY INTERSCHOLASTIC SOCCER TEAM IN ORDER TO SECURE PLAINTIFF'S CONSTITUTIONAL AND STATUTORY RIGHTS.

I. Standards For Granting Preliminary Relief

This court must address two factors in considering plaintiff's motion: "first, the ... possibilities of success on the merits; and second, the possibility that irreparable injury would ... result absent interlocutory relief." Brown v. Choate, 411 U.S. 452, 456 (1973). Beyond these two considerations, this court should consider whether the threatened injury to plaintiff outweighs the harm to defendants if the relief is granted and whether granting the relief will serve the public interest. New York Pathological & X-Ray Lab., Inc. v. Immigration & Nationalization Service, 523 F. 2d 79, 81 (2d Cir. 1975); Buchanan v. United States Postal Service, 508 F. 2d 259, 266 (5th Cir. 1975).

Measured against these standards, plaintiff's motion for temporary injunctive relief must be granted.

II. Plaintiff Will Succeed On The Merits

A. DEFENDANTS' ACTIONS VIOLATE PLAINTIFF'S RIGHT TO THE EQUAL PROTECTION OF THE LAWS.

Plaintiff has been told she may not play soccer, not because she lacks skills, talent or commitment, but because she is a girl. This sex-based discrimination violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

State classifications* on the basis of sex are subject to close scrutiny. To withstand an equal protection challenge, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 209 n. 8 (1977). Furthermore, "...the mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual [underlying] purposes...." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

*Defendant State Athletic Association, although nominally a private organization, is subject to the Fourteenth Amendment's equal protection requirements. Courts have consistently held that the activities of state athletic associations constitute state action. Moreland v. Western Pennsylvania Interscholastic Athletic Association League, 46 U.S.L.W. 241 (3d Cir. 1978); Brenden v. Independent School District, 477 F.2d 1292, 1295 (8th Cir. 1973); Louisiana High School Athletic Association v. St. Augustine High School, 396 F.2d 224, 227-8 (5th Cir. 1968); Oklahoma High School Athletic Association v. Bray, 321 F. 2d 269 (10th Cir. 1963); Yellow Springs School District v. Ohio Athletic Association, 443 F. Supp. 753, 757 (S.D. Ohio 1978); Gilpin V. Kansas State High School Activities Association, Inc. 377 F. Supp. 1233, 1237 (D. Kan. 1974).

Defendants in this case can advance only two objectives to justify keeping plaintiff off South High School's soccer team. First, defendants may claim their actions protect girls from injury. Second, defendants may claim their actions will build a girls' athletics program. Excluding plaintiff from interscholastic soccer competition, however, advances neither objective substantially, as required by Craig. Nor does it advance those objectives even tangentially.

The first justification, protecting girls, crumbles under close examination. First, it is based on an "archaic and overbroad generalization" of the type the Supreme Court has said may no longer be used to exclude females from opportunities open to

> men. Califano v. Goldfarb, 430 U.S, 199, 207 (1977). Defendants have assumed that girls are more fragile and more prone to injury than boys. This assumption is, in the words of a court faced with reliance on such an assumption in a case challenging a girl's exclusion from an all-male soccer team, a "cultural anachronism unrelated to reality." Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977).

Second, this justification is based on the use of averages or norms which the Supreme Court has also condemned as a means of justifying sex-based discrimination. In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court heard a challenge to an Oklahoma statute which permitted girls to buy 3.2% beer at the age of 18; boys had to wait until they were 21. The Court acknowledged that the proffered justification - that on the average boys drink and drive with greater frequency than girls - had some factual basis and the statistical disparaties were "not trivial." 429 U.S. at 201. Nonetheless, the Court held the law unconstitutional and labelled the attempt to prove "broad sociological propositions by statistics" a "dubious busines.. . . that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." 429 U.S. at 204. In City of Los Angeles v. Manhart, ____ U.S. ___, 46 U.S.L.W. 4347 (April 25, 1968), the Supreme Court once again rejected sex averaging as a justification for treating females less favorably than males. Considering classifications on the basis of sex made by insurance companies, the Court concluded, "There are both real and fictional differences between men and women. . . . [But] even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 46 U.S.L.W. at 4348-9.

In Harmony with these Supreme Court rulings is Brenden v. Independent School District, 477 F. 2d 1292 (8th Cir. 1973), a challenge to a state athletic association's rules prohibiting mixed-sex competition. In Brenden the trial court heard extensive

testimony on the physiological differences between teenage boys and girls. Nonetheless, the lower court ruled, and the Court of Appeals upheld the ruling, that prohibiting girls from playing on boys' teams when girls had no comparable opportunity for competition violated the Constitution. Instead of making generalizations on the basis of sex, defendants, according to the appeals court, must search for non-discriminatory standards for evaluating qualifications for athletic competition. Brenden v. Independent School District, 477 F. 2d at 1300.

More recently, in Leffel v. Wisconsin Interscholastic Athletic Association, No. 75-C-174 (E.D. Wis., Jan. 19, 1978), a court explicitly applied the equal protection standard articulated in Craig to a claim of discrimination against girls in athletic programs and concluded:

> Even if defendants' generalizations [about physical differences between boys and girls] are assumed to be true, I nevertheless find that the exclusion of girls from all contact sports in order to protect female high school athletes from an unreasonable risk of injury is not fairly or substantially related to a justifiable governmental objective in the context of the Fourteenth Amendment.

Whether protection of girls from injury is in fact the purpose behind the rule excluding plaintiff from the Freebooters is also questionable. The rule is so ill-suited to that purpose that it invites inquiry into its "actual purpose." See Weinberger Wiesenfeld, 420 U.S. 636, 648 (1975). Athletic Association rules show no pattern of concern for the safety of weaker students. No rule or policy protects weaker boys from the dangers of fierce competition. Nor are girls, regardless of their abilities, protected except in certain sports and except in competition with boys. Yet, all girls, weak or strong, are "protected" from competition with boys in soccer, whether they need that protection or not.

Certainly the application of the rule to plaintiff does nothing to protect her. She is quite decidedly not in need of protection. She is, on the contrary, in need of the opportunity for vigorous and challenging competition.

In short, the rule that keeps plaintiff from playing soccer is too imprecise to accomplish its stated purpose of protecting girls from physical injury. See Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

Nor does the second justification offered, the promotion of girls' sports, withstand close examination. Defendants' argument is nothing more than the claim that plaintiff's participation on the Freebooters will, in some remote, abstract, and unexplained way, set back the development of athletic opportunities for girls. This bare assertion, without support or logic, fails to satisfy the demands of the equal protection clause.

In Gilpin v. Kansas State High School Activities Association, Inc., 377 F. Supp. 1233 (D. Kan. 1974), the court considered a rule similar to defendants' rule and a similar defense that plaintifff's participation would "in some nebulous manner, jeopardize the overall development of the state's girls' athletic programs." 377 F. Supp. at 1242. Rejecting this claim, the court said:

> ...although the Association's overall objective is commendable and legitimate, the method employed to accomplish that objective is simply over-broad in its reach. It is precisely this sort of overinclusiveness which the Equal Protection Clause disdains.

377 F. Supp. at 1243. Similarly, the Court of Appeals in Brenden v. Independent School District, 477 F. 2d 1292 (8th Cir. 1973), found the argument that invalidation of a rule against mixed-sex competition would "have an adverse impact on the future development of opportunities for females in interscholastic sports ...too speculative to have merit..." 477 F. 2d. at 1302. See also Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976).

Certainly, the application of the challenged rule to plaintiff does nothing to advance girls' athletic programs. The only effect is to deny plaintiff the tangible benefits of participation in a competitive sport she enjoys and plays well. If plaintiff's school had a girls' soccer team, then defendants might argue that the detriment to plaintiff personally was justified for the greater good. However, defendants cannot even rely on this questionable justification when the enforcement of the rule only means plaintiff is excluded from any opportunity to play soccer.

Defendants' inability to offer justifications for keeping plaintiff off the Freebooters which can withstand the close examination demanded by Supreme Court interpretations of the equal protection clause makes plaintiff's likelihood of success on the merits overwhelming. Rulings under the equal protection clause in similar cases brought by girls who want to play on boys' teams affirm the chances of success for plaintiff. Fortin v. Darlington, 514 F. 2d 344 (1st Cir. 1975); Brenden V. Indepen-

dent School District, 477 F. 2d. 1292 (8th Cir. 1973); Morris v. Michigan State Board of Education, 472 F. 2d 1207 (6th Cir. 1973); Leffel v. Wisconsin State Athletic Association, No. 75-C-174 (E.D. Wis., Jan. 18,1978); Hoover v. Mieklejohn, 430 F. Supp. 164 (D. Colo. 1977); Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio, 1974); Gilpin v. Kansas State High School Activities Association, Inc., 377 F. Supp. (D. Kan.1973); Reed v. Nebraska School Activities Association,341 F. Supp. 258 (D. Neb. 1972).

B. DEFENDANTS' ACTIONS VIOLATE TITLE IX, 20 U.S.C. §1681.

By refusing to allow plaintiff to play interscholastic soccer, defendants have violated not only the Constitution but also Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq. Title IX outlaws discrimination against women in education. It states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

20 U.S.C. §1681.

Title IX regulations, authorized by legislation and approved by the President, 20 U.S.C. §1682, forbid precisely the practice plaintiff challenges here. The general rule under Title IX regulations governing sports states that educational institutions may not provide athletics, including interscholastic athletics, separately on the basis of sex. 45 CFR 86.41(a).

The regulations carve out two exceptions to this general rule. Neither applies to this case. The first applies to teams based on competitive skills but only when students whose athletic opportunities have been previously limited - like girls in Middletown - have a team of their own. 45 CFR 86.41(b). Girls at South High School have no soccer team. The second exception applies to contact sports. The regulation lists contact sports. They are "boxing, wrestling, rugby, ice hockey, football, basketball..." 45 CFR 86.41(b). Soccer is not among them.

Regulations such as these, issued pursuant to explicit Congressional instructions and approved by the President, 20 U.S.C. §1682, must be accorded controlling weight. In cases construing Title VI regulations of the Civil Rights Act, 42 U.S.C. §2000d et seq., outlawing discrimination on the basis of race in federally assisted projects, courts have stated such regulations have "the force and effect of law." Blackshear Residents Organization v. Housing Authority of Austin, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972); Lee v. Macon County Board of Education, 270 F. Supp. 859, 862 (M.D. Ala. 1967); Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 352 (M.D. Ala. 1967). The language of Title IX authorizing the promulgation of regulations is precisely the same as Title VI language. Compare 20 U.S.C. §1682 and 42 U.S.C. §2000d-1.

III. Plaintiff Will Suffer Substantial and Irreparable Harm If Preliminary Injunctive Relief is Denied

By refusing to allow plaintiff to play for the Freebooters, in violation of her constitutional and statutory rights, defendants are denying plaintiff an important educational opportunity which no monetary or postponed equitable relief can restore.

The opportunity denied plaintiff is substantial. In Brenden v. Independent School District, 477 F. 2d 1292, 1299 (1973), the court recognized girls' interest in interscholastic sports as "substantial and cognizable." Another court addressing discrimination in athletics concluded, "Athletics play an important part in the life and growth of teenage children." Kampmeier v. Nyquist, 553 F. 2d 296, 300 (2d Cir. 1977). The sums defendant School District spends on its interscholastic athletics program are a tribute to its role in the life of the school. See Gilpin v. Kansas Athletic Association, 377 F. Supp. 1233, 1240-1 (D. Kan. 1973); Reed v. Nebraska Activities Association, 341 F. Supp. 258, 262 (D. Neb. 1972).

Playing competitive sports develops physical strength, skills and agility, but the importance of athletics to girls like plaintiff extends beyond physical development. As a court ruling that girls must be given the same opportunity to play football as boys said: "Organized contact sports have generally been thought of as an opportunity and means for a young boy to develop strength of character, leadership qualities and to provide competitive situations through which he will better learn to cope with the demands of the future." Such qualities are "qualities

to which we desire all the young to aspire," without the "imposition of irrational barriers, against one class or another," including classes based on sex. Clinton v. Nagy, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974).

These qualities are as important to plaintiff as they are to her male classmates at South High School. Indeed, at this time, when women are entering fields of endeavor formerly reserved for males, school athletics and the skills they foster are particularly important. Physical strength does matter for success as a welder, police officer or airplane pilot. The capacity to act effectively in competitive situations does matter in corporate board rooms, court rooms or political campaigns. As the Clinton court recognized, girls as well as boys need athletic programs to prepare for future roles.

All of the benefits of vigorous athletics competition will be lost to plaintiff if this court refuses to grant preliminary relief. The soccer season is short; half of it is already over. Lost opportunities to practice and compete cannot be retrieved by equitable relief after trial; at that point the practice fields will be empty and the games over. Nor can money awarded as damages make good the lost opportunities to develop skills and strength.

Recognizing that the harm done is irreparable, courts have granted preliminary injunctions to girls who qualify for competition with boys but are denied the opportunity because state athletic association rules prohibit mixed-sex competition. In

Bednar v. Nebraska School Athletics Association, 531 F. 2d 922 (8th Cir. 1976), the Court of Appeals upheld a district court's ruling that denying plaintiff the opportunity to compete on a cross country team on the basis of sex constituted irreparable harm. Defendants claimed "there was no evidence of 'irreparable harm' and therefore preliminary injunctive relief should not have been issued." The Court of Appeals ruled, "There is no merit to defendants' contentions." 531 F.2d at 923. See Carnes v. Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976); Gilpin v. Kansas State High School Athletic Association, 377 F. Supp. 1233 (D. Kan. 1973); Reed v. Nebraska School Athletic Activities Association, 341 F. Supp. 258 (D. Neb. 1972). Indeed, the Gilpin and Carnes courts considered the harm so immediate they issued temporary restraining orders. See Clinton v. Nagy, 411 F. 2d 1396, 1399 (N.D. Ohio 1974) ruling that denying a girl a chance to play football constitutes "irreparable harm."

The harm to plaintiff is as immediate and irreparable as the harm to plaintiffs in Bednar, Gilpin, Carnes, Reed, and Clinton.

IV. The Harm to Plaintiff Far Outweighs Any Harm to the Defendants and the Public Interest Will Be Served By Granting the Preliminary Relief.

Withholding relief from the plaintiff will deny her immediate, tangible educational opportunities; she will be kept from playing and competing in interscholastic soccer while her teammates finish the season without her. Granting relief only harms the abstract interest defendants may have in upholding their own rules. No girls' athletic programs will suffer. See IIA, supra. Indeed, granting relief will serve the public interest by securing the right of all school students to a complete education free from the damaging taint of gender-based discrimination.

CONCLUSION

For all these reasons, this court should grant plaintiff's motion for a preliminary injunction permitting her to play on the Freebooters and enjoining defendants from enforcing rules which deny her rights under the Fourteenth Amendment to the Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq.

Dated:

Respectfully submitted

_____

Attorney for Plaintiff

FOOTNOTES:

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

1. Supporting affidavits or documents attached as exhibits will be necessary to establish each of the facts in this statement.
2. An affidavit from the plaintiff will probably be the principal tool for getting the facts before the judge. Affidavits from her parents and teammates are other obvious sources. If any school district or athletic association employees or officials are sympathetic, they too might add their voices.
3. Possible helpful documents might be descriptive brochures from the high school or athletic association, letters to parents from the high school about its programs, or the by-laws, charter or constitution of the athletic association.

Women's Rights Project
American Civil Liberties Union

22 East 40th Street • New York, New York 10016 • (212) 725-1222

FROM: Jill Laurie Goodman, WOMEN'S RIGHTS PROJECT
AMERICAN CIVIL LIBERTIES UNION

RE: MEMORANDUM in OPPOSITION to DEFENDANTS' MOTION to DISMISS: Model Pleadings for a Suit On Behalf of a Girl Who Wants To Play Soccer On Her High School's All Male Soccer Team.

DATE: June, 1978

UNITED STATES DISTRICT COURT
FOR THE _____

SUSAN SMITH, by her Mother and Next Friend, MARION SMITH, Plaintiff, v. MIDDLETOWN SCHOOL DISTRICT, et al., Defendants.	:	Civil Action No. _____

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

[Attorneys for Plaintiff]

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122 Cong. Rec. S. 16252 (Daily Ed. Sept. 21, 1976) ~~6, 8~~

122 Cong. Rec. S. 16262 (Daily Ed. Sept. 21, 1976) 8

122 Cong. Rec. S. 17051 (Daily Ed. Sept. 21, 1976) 8

43 Fed. Reg. 7049 (1978) 10

Hearings on H. 330 Before a Subcomittee of Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) 5

Report of Senate Labor and Welfare Committee, Rep. No. 1297, 93d Cong., 2d Sess. (1974) 6

OTHER AUTHORITIES:

American Friends Service Committee, Almost as Fairly: The First Year of Title IX Implementation in Six Southern States, 1977 ~~16~~

PEER, Project on Equal Education Rights, NOW Legal Defense Fund, Stalled at the Start: Government Action on Sex Bias in the Schools (1978) ~~15, 16~~

United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. III: To Ensure Equal Educational Opportunity, Jan. 1975 3

United States Commission on Civil Rights, The State of Civil Rights: 1977 (Feb. 1978) ~~9, 16~~

UNITED STATES DISTRICT COURT
FOR THE _____

SUSAN SMITH, by her Mother and Next Friend, MARION SMITH, Plaintiff,	:	Civil Action
v.	:	No. _____
MIDDLETOWN SCHOOL DISTRICT, et al., Defendants.	:	

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Preliminary Statement

When plaintiff Susan Smith's public high school excluded her from interscholastic soccer because of her sex, she filed suit under 42 U.S.C. §1983, the Fourteenth Amendment and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, to secure her rights to the equal protection of the laws and an education free from sex discrimination. At the same time, plaintiff filed a charge of sex discrimination with the Department of Health, Education and Welfare, attached as Exhibit A. 1/

1/ Besides a letter acknowledging receipt of her complaint, plaintiff has heard nothing from HEW. Affidavit of Susan Smith, ¶2.

On October 9, 1979, this Court entered a temporary restraining order directing defendants to permit plaintiff to play soccer and forbidding them from enforcing the discriminatory rules under which plaintiff had been excluded from competition. Relying on the constitutional cause of action under 42 U.S.C. §1983, this Court, on October 29, 1979, entered a preliminary injunction with the same provisions as the temporary order.

Defendants now move to dismiss the Title IX claim on two grounds. First, defendants claim plaintiff, as a private individual, has no right to bring a suit to enforce Title IX. Second, defendants claim plaintiff's Title IX claim is premature because she has not exhausted her administrative remedies. Neither claim has merit.

I. PLAINTIFF, AS A PRIVATE INDIVIDUAL, MAY BRING SUIT TO ENFORCE TITLE IX.

Defendants claim that the only the federal government may seek to enforce the broad anti-discrimination provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. To reach this conclusion, defendants have misconstrued well-established law on the implication of private rights of action and ignored crucial precedent under Title IX's sister statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. They have, instead, relied principally on a single case which is a radical and unjustified departure from previous interpretations of civil rights laws.

A. Under Well-Established Supreme Court Principles a Private Right of Action Must be Implied for Title IX.

In Cort v. Ash, 422 U.S. 66, 78 (1975), the Supreme Court listed four questions as relevant to "determining whether a private remedy is implicit in a statute not expressly providing one:"

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted... that is, does the statute create a federal right in favor of plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?... And, finally, is the cause of action one traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Although each question must be considered, not all must be answered in plaintiff's favor. Examining Title IX, however, we find that each question is answered in plaintiff's favor. In short, a private right of action is compelled under the Cort v. Ash test.

1. Plaintiff is one of the class for whose especial benefit the statute was enacted.

Congress passed Title IX to protect individuals from sex discrimination in education. The choice of language is significant. It is clear, broad, and directed specifically at the individual who might be subjected to discrimination:

> No person...shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [emphasis added]

20 U.S.C. §1681.

This language echoes that of other civil rights legislation where the Supreme Court has found a legislative intention to protect a class of individuals and an implied right of action to make real the promise of that protection. In Allen v. State Board of Elections, 393 U.S. 544 (1969), the Supreme Court considered whether private citizens could sue to enforce the Voting Rights Act of 1965, 42 U.S.C. §1973. This law provides, in language similar to Title IX, that "no person shall be denied the right to vote for failure to comply with [new state enactments covered by the Act but not approved under the Act's special procedures]." The Supreme Court found that language designed "to protect a class of citizens" and ruled that private individuals must be permitted to seek judicial enforcement of the statute. 422 U.S. at 557.

The use of the "no person" construction in Title IX shows the same intention to protect a class. Plaintiff, excluded from participation in a federally assisted education program, is plainly of the "class" Congress intended to protect.

2. Legislative history indicates legislative intention to create an implied right of action under Title IX.

The second factor under the Cort v. Ash test is whether "there is an indication of legislative intention, explicit or implicit, to create such a remedy or to deny one," 422 U.S. at 78. Contemporaneous legislative history shows no explicit intention either to create or deny a private right of action. Contemporaneous legislative history does, however, show an implicit intention to allow private citizens to sue under Title IX, and subsequent legislative actions show Congress plainly thought it had, in fact, passed a law providing for such suits.

Although the legislative history on Title IX is silent on the direct question of whether a private right of action was intended, legislative history speaks plainly on the question of what kinds of remedies Congress intended to create. Congress passed a law consciously patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, et seq., which, at the time Title IX was enacted, had a widely recognized private right of action.

Sponsors and supporters of Title IX made plain that Title IX, including its enforcement mechanism, was modelled after Title VI. When Senator Bayh first introduced the legislation which later became Title IX, he explained that the provisions for enforcement and judicial review were "identical to those provided for under Title VI of the 1964 Civil Rights Act." 117 Cong. Rec. S.13385 (Daily Ed. Nov. 6, 1971). Later, discussing Title IX's broad provisions against sex discrimination, Senator Bayh said, "[Similar] provisions have been tested under Title VI of the Civil Rights Act for at least 8 years so that we have evidence of their effectiveness and flexibility." 118 Cong. Rec. S.2748 (Daily Ed. Feb. 29, 1972). Members of the House of Representatives also noted the identity of the enforcement

provisions of Title VI and Title IX. See 117 Cong. Rec. H.10356 (Daily Ed. Nov. 4, 1971) (remarks of Representative Mink); 117 Cong. Rec. H.10360 (Daily Ed. Nov. 4, 1971) (remarks of Representative Green.) 2/

The enforcement provisions of Title VI that Congress adopted for Title IX included an implied private right of action. When Title IX was debated in 1971 and 1972, judicial interpretations had firmly established the right of individuals to sue under Title VI. In 1967, the Fifth Circuit decided Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967), in which Negro children brought suit against a segregated school district. The Bossier court said, "In the absence of a procedure through which the individuals protected by [Title VI]'s prohibition may assert their rights under it, violations of the law are recognized by the courts," and, in unequivocal language, ruled, "The Negro school children, as beneficiaries of the Act, have standing to assert their [Title VI] rights." 370 F.2d at 852. Other courts had reached the same conclusion. Alvarado v. El Paso Independent

2/ Indeed, Representative O'Hara, later explaining the genesis of Title IX, said the bill was prepared from a retyped, slightly altered Xerox copy of Title VI. Hearings on H. 330 before a Sub-Committee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess. at 16 (1975).

School District, 445 F.2d 1011 (5th Cir. 1971); Southern Christian Leadership Conference, Inc. v. Connolly, 331 F.Supp. 940, 943 (E.D. Mich. 1971); Rolfe v. County Board of Education of Lincoln County, Tenn., 282 F.Supp. 192, 194 (E.D. Tenn.1966).

Legislative actions after the passage of Title IX confirm this understanding on the part of Congress that Title IX remedies included a private right of action. First, when Congress passed the Rehabilitation Act Amendments of 1974, 29 U.S.C. §701, it looked to Title VI and Title IX for language and remedies. These, Congress assumed, included a private right of action. The report of the Senate Labor and Public Welfare Committee said: "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of [Title VI] ... and [Title IX]." S. Rep. No. 1297, 93d Cong., 2d Sess. (1974) at 39-40. Discussing remedies, the Report said, "This approach to implementation of Section 502, which closely follows the models of the above-cited anti-discrimination provisions, would...permit a judicial remedy through a private right of action." Id. at 40.

Second, when Congress passed the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, which authorizes courts to grant attorneys fees in actions brought under certain statutes, Congress included Title IX among the enumerated statutes. Permitting awards of attorney's fees to "the prevailing party other than the United States" in an act designed to assist in civil rights enforcement makes sense if and only if private parties may bring suit.

Indeed, supporters of the Attorney's Fees Act assumed a private right of action did exist under Title IX. Senator Scott, initiating Senate debate on the Act, said, "Each of the provisions covered by [the bill] relies upon private enforcement." 122 Cong. Rec. S.16251 (Daily Ed. Sept. 21, 1976). Senator Kennedy, sponsor of the amendment to include Title IX in the Attorney's Fees Act, said, "Inclusion of cases brought under Title IX would mean...courts would be able to make discretionary awards of attorney's fees to successful litigants in order to assist private enforcement efforts in this crucial area of the law..." Id. at S.16252. See also, id. at S.16251 (remarks of Senator Scott); id. at H.12164 (remarks of Representative Holzman). The Attorney's Fees Awards Act, of course, did not create a new cause of action; the statements of its supporters, however, do demonstrate their assumption that Title IX already provided for such actions.

In short, legislative history shows Congress intended to create a private right of action under Title IX and assumed it had succeeded.

3. A private right of action is consistent with the underlying purposes of Title IX.

A private right of action is not only consistent with the underlying purposes of Title IX; it is essential to the statute's goal. The task of civil rights enforcement is enormous. Title IX, for example, covers nearly 17,000 public school systems, serving over 45,000,000 students, and over 2,300 colleges and universities. United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. III: To Ensure Equal Educational Opportunity, Jan. 1975, at 1, 273 [Civil Rights Commission Report]. Private efforts are needed to supplement government activities.

The Supreme Court has recognized the limitations of federal civil rights efforts and the resulting need for a private cause of action. In Allen v. State Board of Elections, 393 U.S. 544 (1969), the Court considered whether private rights of action were implicit under a civil rights statute and ruled that they were on the basis of the need for private enforcement. Noting the limits of the attorney general's staff, which was charged with enforcement, the Court said, "The achievement of the Act's laudable goal could be severely hampered...if each citizen were required to depend solely on the attorney general." 393 U.S. at 556. 3/ This language echoes the Court's statement earlier that same Term: "[I]t was evident [when civil rights laws were passed] that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." Newman v. Piggie Park Enterprises, 390 U.S. 400, 401 (1968). Cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).

3/ The need to supplement limited federal enforcement efforts has also been the basis for finding an implied right of action in non-civil rights cases. See J. L. Co. v. Borak, 377 U.S. 426 (1964); DeJesus Chavez v. LTV Aerospace Corp., 412 F.Supp. 4 (N.D. Tex. 1976); Sierra Club v. Mortin, 400 F.Supp. 610, 625 (N.D. Cal. 1975), Miller v. Mallery, 410 F.Supp. 1283, 1289-90 (D. Ore. 1976).

Congress, too, has acknowledged the role of private enforcement in the face of federal enforcement failures. In 1976, Congress passed the Attorney's Fees Awards Act, 42 U.S.C. §1988, authorizing awards in civil rights actions precisely because government enforcement alone had proved insufficient. Senator Kennedy, explaining why both Title VI and Title IX should be included in the bill, said, "...it is essential that private enforcement be made possible.... Long experience has demonstrated...that Government enforcement alone cannot accomplish [the elimination of discrimination in education]." 122 Cong. Rec. S.16252 (Daily Ed. Sept. 21, 1976). Senator Tunney spoke even more emphatically: "Although some [of the laws covered by the Act] can be enforced by the Justice Department or other federal agencies, most of the responsibility for enforcement has to rest upon private citizens." Id. at S.17051. See, id. at S.16262 (remarks of Senator Allen); 122 Cong. Rec. H.12165 (Daily Ed. Oct. 1, 1976) (remarks of Representative Seiberling); id. at H.12159 (remarks of Representative Drinan); id. at H.12164 (remarks of Representative Holzman).

Confirming the need for private actions to supplement the work of federal agencies, the United States Commission on Civil Rights has levelled sharp criticism at HEW for its ineffective Title IX enforcement. In 1974, two years after Title IX became law, the Commission reported the only major step HEW had taken to implement Title IX was the issuance of proposed regulations.

Civil Rights Commission Report, 1974 at 224. No permanent regulations had been issued, id. at 220, and no review procedures had been established for Title IX compliance, id. at 267. By September, 1974, HEW had conducted only eight joint Title VI-Title IX reviews at colleges and universities, id. at 268, and those reviews contained "major deficiencies, most of which concerned Title IX matters." Id. at 269.

HEW Title IX enforcement has shown no improvement since the 1974 report. In its most recent report, the Civil Rights Commission found, "In elementary, secondary, and higher education, inadequate enforcement of anti-discrimination laws [including Title IX] persisted in 1977." United States Commission on Civil Rights, The State of Civil Rights: 1977 (Feb. 1978) at 13. 4/

The limitations of enforcement efforts make clear that a private right of action is at least consistent with Title IX and, indeed, compel a finding of an implied Title IX private right of action.

4. A cause of action under Title IX is not one relegated to state law.

Elimination of the damaging effects of discrimination has been a federal issue since the passage of the post-Civil War Amendments to the Constitution. In recent decades, discrimination in schools has been an active and intimate concern of federal courts and federal law. Cf. Brown v. Board of Education,

4/ HEW's overall enforcement record has forced civil rights activists to turn to the courts to compel HEW to enforce Title IX and Title VI. See Brown v. Califano, 417 F.Supp. 1215 (D.D.C. 1976); Adams v. Califano, C.A. No. 70-3095 (D.D.C., Order, Dec. 29, 1977); WEAL v. Califano, C.A. No. 74-1720 (D.D.C., Order, Dec. 29, 1977). Although WEAL and Adams were settled in December, 1977, backlogs in complaint handling will continue for at least two years.

347 U.S. 483 (1954); Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971). Actions like this to secure equal rights for public school students surely are not relegated to the province of state law. See 28 U.S.C. §1334.

B. Title VI precedent Compels a Finding of an Implied Right of Action Under Title IX; Cannon and Cases Following Cannon are Unjustified Departures from Previous Case Law.

Defendants, in arguing plaintiff has no right to sue under Title IX, place major reliance on Cannon v. University of Chicago, 559 F.2d 1063, aff'd en banc, 559 F.2d 1077 (7th Cir. 1977), petition for cert. filed Dec. 28, 1977 (46 U.S.L.W. 3438), and the few cases following Cannon. 5/ This approach ignores the large body of Title VI case law to the contrary and depends instead on a radical and unjustified departure from previous decisions.

Courts deciding Title IX procedural cases must look to Title VI law for precedent. Title IX's legislative history shows explicit Congressional intention to adopt Title VI procedures for Title IX. See IA, infra. The language of the two statutes is nearly identical except that Title VI outlaws discrimination

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5/ Lodwig v. Board of Education of the Pleasant Local School District, C.A. No. 76-604 (N.D. Ohio, March 31, 1977) appeal pending, 6th Cir. No. 77-3375. Leake v. Cincinnati University, 14 FEP Cases 1 (S.D. Ohio 1976); Cape v. Tennessee Secondary School Athletic Association, 424 F.Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds, 563 F.2d 793 (6th Cir. 1976).

Lower courts have refused to follow Cannon. Alexander v. Yale University, C.A. 77-277 (D. Conn.,Jan. 31, 1978). Grossman v. Texas Tech University, C.A. 5-77-23 (N.D. Texas, Order, Nov. 18, 1977).

on the basis of race, color or national origin and Title IX outlaws discrimination on the basis of sex. Compare 42 U.S.C. §2000d, et seq., and 20 U.S.C. §1681, et seq. Title IX regulations, 45 CFR 86.71, adopt and incorporate by reference Title VI regulations. Even the Cannon court recognized the significance of Title VI precedent in deciding Title IX cases. 559 F.2d at 1012; 599 F.2d at 1083.

Until Cannon, no court seriously questioned the existence of a Title VI private right of action. Bossier Parish Schools v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967), established a Title VI private right of action in clear language: "[P]rivate citizens as beneficiaries of the Act, have standing to assert their [Title VI] rights." 370 F.2d at 852. Since Bossier, courts have explicitly found individual plaintiffs have the right to sue under Title VI, Uzzell v. Friday, 547 F.2d 801, 803 (4th Cir. 1977); Laufman v. Oakley Building and Loan Co., 408 F.Supp. 489, 498-99 (S.D. Ohio 1976); Natonabah v. Board of Education, 355 F.Supp. 716, 724 (D.N.M. 1973), and assumed such a right by consistently deciding Title VI cases brought by private citizens, Lau v. Nichols, 414 U.S. 563 (1968); Garrett v. City of Hamtramck, 503 F.2d 1236, 1247 (6th Cir. 1974); Serna v. Portales Municipal Schools, 499 F.2d 1147, 1152-53 (10th Cir. 1974); Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.D.C. 1976). Finding or assuming a private right of action, courts have decided Title IX cases brought by individuals as well. Piascik v. Cleveland Art Museum, 426 F.Supp. 779, 781 (N.D.Ohio 1976); Trent v. Perritt, 391 F.Supp. 171, 173 (S.D. Miss. 1975). Cf. Berkleman v. San Francisco Unified School District, 501 F.2d 1264, 1269 (9th Cir. 1974).

The Seventh Circuit in its Cannon opinions attempted to explain away Title VI precedent as cases based on the Constitution rather than the statute. 6/ 550 F.2d at 1072, 559 F.2d at 1082, n. 6. In support of this proposition the Court cites in particular Lau v. Nichols, supra, and Bossier Parish v. Lemon, supra. Neither case supports the court's position and, indeed, both cases were explicitly decided on Title VI grounds. The language in Lau could hardly be stronger: "We rely solely on §601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d [Title VI] to reverse the Court of Appeals." 414 U.S. at 566. 7/ The Bossier court not only made plain its reliance on Title VI but decided, explicitly, firmly, and in favor of the plaintiffs, the issue of whether private individuals may bring Title VI suits. 470 F.2d at 851-52.

6/ Indeed, the Court of Appeals went so far as to suggest that cases like Bossier explicitly recognizing a right of action under Title VI do not mean what they say in plain English. Rather, Cannon said the language is "shorthand" for saying plaintiffs had made out a constitutional claim under 42 U.S.C. §1983. The Court of Appeals insisted on this point even in cases which do not even mention 42 U.S.C. §1983. 559 F.2d at 1082, n. 6.

7/ The Cannon court makes another attempt to read away Lau. Relying on a short, two paragraph concurrence by Justice Blackmun, Cannon says private citizens may bring suit under Title VI, if at all, only when discrimination is alleged against a large group of individuals. 559 F.2d at 1072, 1083.

Here, the court misreads Justice Blackmun. Lau concerned discrimination against school children who spoke only Chinese by a school system that offered only some of those children remedial work. Justice Blackmun concurred separately only "to make plain that...[were] we concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish" a school district would not necessarily be obliged "to provide special funding." 414 U.S. at 571. Nowhere does Justice Blackmun suggest the right to bring suit under Title VI depends on the number of persons touched by the discrimination.

The Cannon court also argued that a private right of action is inconsistent with Title IX's "carefully constructed scheme of administrative enforcement." 559 F.2d at 1073. The existence of an administrative scheme does not preclude a finding of a private right of action. And Title IX's administrative scheme, carefully constructed or not, has simply failed to work. Private enforcement is essential to make Title IX's promise of non-discriminatory education a reality. See, infra IA3.

The federal government itself takes exception to the Cannon ruling and the doubt it casts on a private right of action under Title VI. In the rehearing en banc before the Seventh Circuit, the federal defendants joined the Cannon plaintiff in pressing for recognition of the private right to sue. 559 F.2d at 1080. The federal defendants have also joined the Cannon plaintiff in her request that the Supreme Court reverse the Seventh Circuit's ruling on private rights of action. See Brief for the Federal Respondents. Furthermore, in a supplemental brief in Regents of the University of California v. Bakke, now before the Supreme Court, cert. granted ____ U.S. ____, 45 U.S.L.W. 3570 (1977), the federal government argued forcefully that private persons may bring suit under Title VI. Brief for United States as Amicus Curiae at 24-25.

At least one lower court has explicitly declined to follow Cannon. The court in Alexander v. Yale University, C.A. 77-277 (D. Conn., Jan. 31, 1978), had before it a motion to dismiss a suit brought by a Yale student alleging sex discrimination in violation of Title IX. Applying the Cort v. Ash test, the court found that it was "patent under Title IX that 'the remedies available have proven wholly inadequate to

the task of protecting those rights,'" Slip Op. at 10, and refused to dismiss the complaint. See also Grossman v. Texas Tech University, C.A. 5-77-23 (N.D. Texas, Order, Nov. 18, 1977).

This Court should follow the older, firmer, and extensive precedent finding an implied cause of action under Title VI and the lead of the Alexander Court, rather than Cannon.

II. SINCE EXHAUSTING REMEDIES WOULD BE FUTILE IN THIS CASE, PLAINTIFF MAY MAINTAIN THIS ACTION WITHOUT WAITING FOR HEW TO COMPLETE THE ADMINISTRATIVE PROCESS.

Defendants argue alternatively that plaintiff's Title IX claim must be dismissed for failure to exhaust administrative remedies. However, the administrative process for Title IX enforcement has moved so slowly and to such little effect that requiring plaintiff to wait for HEW to make its determination would, for all practical purposes, leave her with no Title IX remedy. The doctrine of exhaustion of administrative remedies does not compel this result.

The doctrine of exhaustion of administrative remedies requires the judiciary to withhold relief in certain circumstances until administrative agencies have had an opportunity to act. McKart v. United States, 395 U.S. 184, 193 (1969). However, there is no requirement "that the exhaustion doctrine be applied blindly in every case." Id. at 200-1. Indeed, the doctrine is "subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." Id. at 193.

One of those exceptions arises when exhaustion would be futile. "Nothing is lost by circumventing an open but assuredly ineffectual avenue of administrative appeal." American Federation of Government Employees v. Acree, 475 F. 2d 1289, 1292 (D.C. Cir. 1973). See NAACP v. Wilmington Medical Center, Inc., 426 F. Supp. 1105 (D. Del. 1977).

This exception applies to plaintiff's case. Title IX regulations, 45 CFR 86.71, which adopt and incorporate Title VI procedural provisions, 45 CFR 80.6-80.11 and 45 CFR Part 81, prescribe certain procedures for handling Title IX complaints. When a complaint is made, HEW must make a "prompt investigation." 45 CFR 80.7(c). If HEW finds Title IX violations, the Department must try to use informal means to achieve voluntary compliance. 45 CFR 80.7(d), and, if that effort fails, HEW may begin the process of withholding federal funds, 45 CFR 80.8(a). Before this extreme remedy may be applied, however, HEW must hold hearings and give notice to Congress of its intentions, 45 CFR 80.8-80.9. After attempts at voluntary compliance, HEW may take other steps besides withholding funds, but, again, only after HEW has given notice of the steps it intends to take and given another opportunity for voluntary compliance. 45 CFR 80.8(a).

While these procedures are spelled out, they are all discretionary. Under them, HEW's only obligation is to make a "prompt investigation" of a complaint. In fact, HEW has never used Title IX regulations to enforce its broad mandate against sex discrimination in eduation. Nor has HEW even made the "prompt investigations" which are mandatory under its own regulations.

HEW's record on Title IX enforcement and complaint resolution is notorious. An exhaustive study of HEW Title IX enforcement made with the full cooperation of HEW and extending to an examination of nearly 1,000 case files in four out of eleven HEW regional offices concluded, "Title IX enforcement has been stalled from the start." PEER, Project on Equal Education Rights, NOW Legal Defense Fund, Stalled at the Start: Government Action on Sex Bias in the Schools at 1 (1978) [PEER Study]. According to the PEER study, four years after Congress passed Title IX, HEW had resolved only 179 complaints, just a fifth of those filed. Two or three year delays were common and more than a third of the complaints made in 1973 were unresolved three years later. Most investigations were superficial and involved little more than correspondence with a school superintendent. 8/ Id.

8/ An investigation by the American Friends Service Committee reached a similar conclusion:

> It was the hope of the American Friends Service Committee that the years of delay, evasion and defiance experienced in school desegregation would not be repeated with Title IX. The disappointment is, that in districts monitored for this report, identical patterns are being set and reinforced.... The situation results in large part from the failure of the Office for Civil Rights, HEW, to set clear and consistent policies and enforce them to implement the law.

Southeastern Public Education Program of the American Friends Service Committee, Almost as Fairly: The First Year of Title IX Implementation in Six Southern States, 1977.

Backlogs of Title IX complaints continued into 1978. The United States Commission on Civil Rights reported that HEW's Office for Civil Rights (OCR) began fiscal year 1978 with a backlog of about 3,025 complaints and the expectation that an additional 2,455 complaints would be filed within the year. OCR anticipates resolving only 1,255 of the outstanding complaints and 246 of the new complaints in 1978.[9/] United States Commission on Civil Rights, The State of Civil Rights: 1977, Feb. 1978, at 13, n. 71.

Nor will HEW's complaint handling improve radically in the near future. Under the consent decree in WEAL v. Califano, C.A. 74-1720 (D.D.C., Order, Dec. 29, 1977), backlogs will continue at least through the end of fiscal year 1979 and quite possibly beyond. Even after fiscal year 1979, when strict time-frames for handling Title IX complaints go into effect, HEW will be permitted to ignore these requirements for up to 30% of the complaints filed. See also OCR's operating plan FY 1978, 43 Fed. Reg. 7049 (1978). In short, Title IX complaint resolution will continue to work slowly, if at all, for years to come.

Plaintiff's experiences with HEW's Title IX complaint resolution are typical and, indeed, illustrate the futility of turning to HEW for Title IX enforcement. Plaintiff filed a

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9/ Cases charging discrimination in athletics are caught in this backlog. Complaints about athletics programs were involved in 351 of the 858 complaints filed during the first four years after Title IX became law. HEW made a finding in only 175 of those cases and reached a negotiated remedy in only 7%. PEER Study at 59-60.

complaint with the regional office of HEW on October 5, 1979, and charged defendants with sex discrimination. A month later, HEW acknowledged receipt of the complaint. Not a word has been heard from HEW since. If plaintiff is forced to wait until HEW investigates and attempts voluntary compliance before proceeding, her years for playing high school soccer may well be over.

Defendants cite a host of cases for the proposition that exhaustion of administrative remedies is required in Title VI cases[10/] and thus should be required in this case. Those cases arose in a different context; they were suits by private citizens to compel the federal government to terminate financial aid to federal projects, not suits for injunctive and declaratory relief directly against the offending program. See Green Street Association v. Daley, 373 F.2d 1, 8-9 (7th Cir. 1967), cert. denied 387 U.S. 932 (1967); Johnson v. County of Chester, 413 F.Supp. 1299, 1310 (E.D. Pa. 1976); Green v. Cauthen, 379 F.Supp. 361, 378-9 (D.S.C. 1974); Powelton Civic Home Owners' Ass'n. v. HUD, 284 F.Supp. 809 (E.D. Pa. 1968).

10/ Two courts seem to require exhaustion of remedies for Title IX suits. However, both courts also found against a private right of action under Title IX. The two rulings are mutually exclusive. If there is no private right of action, there is no possible plaintiff who can be required to wait until administrative decisions are completed to file suit. Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D.Ill. 1976), aff'd on other grounds 559 F.2d 1063 (7th Cir. 1977); Cape v. Tennessee Secondary School Athletic Association, 424 F.Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds 563 F.2d 793 (6th Cir. 1977). But see Alexander v. Yale University, C.A. 77-277 (D. Conn., Jan. 31, 1978); Grossman v. Texas Tech University, C.A. 5-77-23 (N.D. Texas, Order, Nov. 18, 1977).

This distinction is significant. Both Title VI and Title IX treat the powerful remedy of withholding funds differently from other forms of relief. The texts of both statutes and HEW regulations surround the application of this remedy with unique procedural safeguards. See 20 U.S.C. §1682, 42 U.S.C. §2000-1, 45 CFR 80.8-80.11. In light of this carefully constructed procedure, courts might well hesitate to "interfere" with on-going efforts at voluntary compliance, Johnson v. County of Chester, 413 F.Supp. 1299, 1310 (E.D. Pa. 1976), or permit plaintiffs to "short circuit" an investigation still in progress, Green v. Cauthen, 379 F.Supp. 361, 378-9 (D.S.C. 1974).

Plaintiff's case is different. She does not ask this Court to compel the federal government to withhold federal funds without following explicit statutory and regulatory procedures. Nor does she ask this Court to interfere with investigations or efforts at voluntary compliance. She simply asks this Court to grant relief securing her statutory rights which HEW seems unprepared or unable to do.

Indeed, the court in Alexander v. Yale University, C.A. 77-277 (D. Conn., Jan. 31, 1978), finding HEW unprepared or unable to enforce Title IX, rejected a defendant's claim that a private Title IX plaintiff must exhaust administrative remedies. In Alexander the plaintiff made no attempt to use HEW enforcement mechanisms and had filed no charge. Nonetheless, referring to HEW's poor enforcement record and placing heavy reliance on imminent injury to the plaintiff, the court held that forcing plaintiff to depend on administrative remedies would be "an empty exercise." Slip Op. at 11.

Forcing plaintiff in this case to wait for HEW to act would, as in Alexander, be nothing but "an empty exercise," not required by the doctrine of exhaustion of administrative remedies.[11/]

11/ If, however, this Court hesitates to find HEW procedures futile, this Court could adopt the compromise struck by the court in Mendoza v. Lavine, 412 F.Supp. 1105, 1109 (S.D.N.Y. 1976). There defendants moved to dismiss a Title VI case for failure to exhaust administrative remedies and plaintiffs argued that completing the administrative process would be futile. The court denied the motion to dismiss and permitted pre-trial preparation to continue while the HEW administrative process went forward. The court indicated that if HEW did resolve the dispute a dismissal would be proper. See also NAACP v. Wilmington Medical Center, Inc., 426 F.Supp. 919, 925 (D. Del. 1977), for a similar resolution.

CONCLUSION

For all of these reasons, the Court should deny defendants' motion to dismiss plaintiff's claims under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

Respectfully submitted,

Dated:

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[Attorneys for Plaintiff]